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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ST. JOSEPH'S HILL INFIRMARY, INC.,
Appellant,

vs.

RABBI HERBERT J. MANDL, *et al.* as members of the
MISSOURI HEALTH FACILITIES REVIEW COMMITTEE,
Non-interested Party,

and

PACIFIC CARE CENTER, INC.,
Appellee.

On Appeal From The Missouri Court Of Appeals
Eastern District

STATEMENT OF JURISDICTION

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QUESTION PRESENTED

The National Health Planning and Resources Development Act of 1974, as amended ("NHPRDA"), directs any state wishing to participate in health planning to establish a certificate of need program that meets minimum federal standards. One of those standards requires the state to guarantee existing area health care providers the right to judicial review of decisions to issue certificates of need for the establishment of new, competing health care facilities. Missouri enacted a Certificate of Need Law to participate in the NHPRDA planning program, but refused to accord existing area health care providers any right to seek judicial review of certificate of need decisions.

1. The question presented here is whether a state certificate of need law, enacted pursuant to the NHPRDA, is invalid under the Supremacy Clause of the U. S. Constitution because it denies an existing area health care provider standing to seek judicial review of the issuance of a certificate of need for the establishment of a competing health care facility as required by the conditions of participation contained in the NHPRDA.

STATEMENT OF PARTIES

Pursuant to Supreme Court Rules 15 and 28.1, the parties to the proceeding in the Missouri Court of Appeals Eastern District are those listed in the caption. As noted, the Missouri Health Facilities Review Committee ("Committee"),[1] although named as a party below, never appealed from the circuit court judgment and never participated in any of the appellate proceedings. Notice is provided, however, to the Missouri Attorney General pursuant to Supreme Court Rule 28.4(c) because the constitutionality of a Missouri statute is drawn into question by this appeal. St. Joseph's Hill Infirmary, Inc. ("St. Joseph's") is a not-for-profit corporation with no parent company or any subsidiaries.

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[1] The Committee was sued through its individual members, but only in their official capacity as members of the Committee. The individual Committee members named in St. Joseph's Petition are Rabbi Herbert J. Mandl, Chairman, Susan Bradshaw, Richard Hirshl, State Representative Anthony Ribaudo, Stephen Spiegel, Gordon Warren, State Senator Richard Webster, State Senator John Dennis, and State Representative Robert Ellis Young. (App. at 3.)

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and

PACIFIC CARE CENTER, INC.,
Appellee.

On Appeal From The Missouri Court Of Appeals
Eastern District

STATEMENT OF JURISDICTION

St. Joseph's respectfully prays that plenary consideration be given to the question presented by the decision of the Missouri Court of Appeals Eastern District in this case, entered on January 29, 1985.

OPINIONS BELOW

The Committee approved Pacific Care Center, Inc.'s ("Pacific Care") certificate of need application on January 31,

1983, without issuing findings of fact and conclusions of law. St. Joseph's appealed the Committee decision to the Circuit Court for Jefferson County, State of Missouri.

On July 15, 1983, the Circuit Court issued its Findings of Fact, Conclusions of Law and Judgment in favor of St. Joseph's. The decision is not officially reported. A copy of the Findings, Conclusions and Judgment is included as Appendix A. Pacific Care appealed the Circuit Court judgment to the Missouri Court of Appeals Eastern District.

The Court of Appeals reversed the Circuit Court judgment on the grounds that St. Joseph's lacked standing. The decision is officially reported at 682 S.W.2d 821 (Mo.App. 1984). A copy of the decision is included as Appendix B. St. Joseph's moved for rehearing by the Court of Appeals or transfer to the Missouri Supreme Court.

The Court of Appeals denied St. Joseph's Motion for Rehearing or for Transfer in a Per Curiam Opinion that is not officially reported. A copy of the Opinion is included as Appendix C.

St. Joseph's then applied to the Missouri Supreme Court for transfer of this case. The Missouri Supreme Court sustained St. Joseph's application to transfer for plenary review by the Court En Banc. The Missouri Supreme Court Order is not officially reported. A copy of the Order is included as Appendix D.

After full briefing and argument before the Court En Banc, the Missouri Supreme Court retransferred this case to the Court of Appeals Eastern District without deciding the case. The Supreme Court's retransfer Order of January 23, 1985, is not officially reported. A copy of the Order is included as Appendix E.

By Order dated January 29, 1985, the Court of Appeals accepted transfer and reissued its earlier opinion. The Court of Appeals Order is not officially reported. A copy of the Order is included as Appendix F.

On March 11, 1985, the Mandate of the Court of Appeals issued to the Circuit Court of Jefferson County. A copy of the Mandate is included as Appendix G. In obediance to the Court of Appeals' Mandate the Circuit Court entered judgment upon remand on April 5, 1985. The Circuit Court's judgment, unofficially reported, is included as Appendix H.

JURISDICTION

By Order dated January 29, 1985, the Missouri Court of Appeals Eastern District accepted transfer from the Missouri Supreme Court En Banc and reinstated its Opinion dated May 22, 1984, reversing the judgment of the Circuit Court of Jefferson County.

Notice of this Appeal was filed in the Missouri Court of Appeals Eastern District on April 26, 1985. A copy of the Notice of Appeal is included as Appendix H. That same day St. Joseph's applied for an Extension of Time to File its Jurisdictional Statement. By Order dated May 1, 1985, the Honorable Harry A. Blackmun, Associate Justice of this Court, granted St. Joseph's application and extended the time for filing the Jurisdictional Statement to May 29, 1985.

Jurisdiction to review this decision by direct appeal is conferred upon the Supreme Court by 28 U.S.C. §1257(2).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(a) The Supremacy Clause of the United States Constitution, Article VI, Clause Two, which provides:

> This constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the con-

stitution or laws of any state to the contrary notwithstanding.

(b) Subsection (b)(12)(E) of the National Health Planning and Resource Development Act, 42 U.S.C. §300n-1, which provides:

> Minimum Procedures
>
> (b) Each health systems agency, State Agency, and Statewide Health Coordinating Council shall include in the procedures required by subsection (a) of this section at least the following:
>
> * * * *
>
> (12) The following procedural requirements with respect to proceedings under a certificate of need program:
>
> * * * *
>
> (E) Any person adversely affected by a final decision of a State Agency with respect to a certificate of need or an application for an exemption under section 300n-6(b) of this title and a health systems agency if the decision respecting the certificate of need is inconsistent with any recommendation made by the agency to the State Agency with respect to the certificate of need may, within a reasonable period of time after such decision is made (and any administrative review of it completed), obtain judicial review of it in appropriate State court. The decision of the State Agency shall be affirmed upon such judicial review unless it is found to be arbitrary or capricious or not made in compliance with applicable law.

(c) Section 197.335 of the Missouri Certificate of Need Law, Mo.Rev.Stat. §197.300, *et seq.* (1984 Cum.Supp.), which provides as follows:

Appeals, venue.—Within thirty days of the decision of the committee, the applicant or the health systems agency within whose area the new institutional health service is to be offered may file an appeal in accordance with the provisions of sections 161.252 to 161.342 and chapter 536, R.S.Mo. provided, that venue of any appeal to the circuit court shall be in the county within which such health care service or facility is proposed to be developed.

STATEMENT OF THE CASE

A. Parties Below

Appellant St. Joseph's is a not-for-profit Missouri corporation owned and operated by the Franciscan Missionary Brothers. (App. at 2.) The Brothers are a religious order devoted by their calling to the care of the sick and infirm. (*Id.*) Accordingly, St. Joseph's owns and operates two nursing homes—St. Joseph's Hill Infirmary and Price Memorial. (*Id.*)

The Missouri Health Facilities Review Committee ("Committee") is an administrative agency of the State of Missouri created pursuant to the Missouri Certificate of Need Law, Mo.Rev.Stat. §197.300, *et seq.* (1984 Cum.Supp.). The Missouri Certificate of Need Law ("Missouri CON Law") prohibits any person from offering or developing any new institutional health service or facility, costing in excess of certain expenditure minimums, unless the Committee first determines that the proposed facility or service is "needed." See, Mo.Rev.Stat. §197.315.1 (1984 Cum.Supp.).

The nine member Committee is composed of five lay persons appointed by the Governor and four Missouri state legislators appointed by the speaker of their respective legislative houses. See, Mo.Rev.Stat. §197.310.2 (1984 Cum.Supp.). Committee members serve without compensation. See, Mo.Rev.Stat. §197.310.7 (1984 Cum.Supp.). The Committee does receive clerical and administrative support from the State Health Plan-

ning and Development Agency ("SHPDA"). See, Mo.Rev.Stat. §197.310.1 (1984 Cum.Supp.). SHPDA's principal function, however, is to provide an independent analysis of each certificate of need application, with a recommendation for approval or disapproval, for the Committee. See, Mo.Rev.Stat. §§197.325 and 330.1(4) (1984 Cum.Supp.); 13 C.S.R. 60-3.050(4) and (6).[2]

Appellee Pacific Care Center, Inc. ("Pacific Care") is a for-profit Missouri corporation that was formed for the purpose of developing a 120 bed nursing home. (App. at 3.) Pacific Care's proposed nursing home is to be located within fifteen miles of both of St. Joseph's nursing homes. (*Id.*) The parties stipulated that if Pacific Care's proposed facility was constructed it would directly compete with St. Joseph's two facilities for residents. (*Id.*)

B. **Pacific Care's Application For A Certificate Of Need.**

On September 7, 1982, Pacific Care submitted an application to the Committee for a certificate of need to build and operate its proposed nursing home. (App. at 3.) Notice of the application was given by SHPDA to area health care providers (App. at 4) as required by the Missouri CON Law. See, Mo.Rev.Stat. §197.330.1(2) (1984 Cum.Supp.). Because certain affected persons, including St. Joseph's, timely requested a public hearing on Pacific Care's application, one was conducted on January 6, 1983, (App. at 5). See, Mo.Rev.Stat. §197.330.1(3) (1984 Cum.Supp.). At the hearing St. Joseph's made statements and submitted documents in opposition to Pacific Care's application. (App. at 5.)

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[2] The cited statutory and regulatory provisions refer to a "health systems agency" performing the review and analysis of certificate of need applications for the Committee. In 1982, however, SHPDA succeeded to the review and analysis functions of health systems agencies by Executive Order of Missouri's Governor. See, footnote 3, *infra.*

On January 31, 1983, the Committee met to consider, among other matters, Pacific Care's application. (App. at 5.) The Committee heard presentations for and against Pacific Care's application, including additional statements and documents in opposition from St. Joseph's. (*Id.*)

SHPDA then presented its evaluation of Pacific Care's application. A copy of the report is included as Appendix I. SHPDA concluded that based on the excess supply of nursing home beds in the area: "additional beds would be necessary, duplicative, and potentially harmful to the functions of other providers in the market place. Therefore, it is recommended that this project not be granted a Certificate of Need." (App. at 5-6.) With respect to St. Joseph's, SHPDA noted that Pacific Care's project "would affect Price Memorial Nursing Home in Eureka. Price Memorial is a new 120 bed non-medicaid facility just licensed in September, 1981. After 16 months of operation, the facility has only 28% of its beds filled." (App. at 56.) SHPDA calculated that Pacific Care's project, if approved, would generate an extra $80,000 a year in operating costs to consumers of Pacific Care's services, such as the Medicare and Medicaid programs, to fund the unneeded capacity. (App. at 65.)

The Committee, with a minimum quorum of five, voted three-two to approve Pacific Care's application. (App. at 6.) Pursuant to Section 197.330.1(6) of the Missouri CON Law, St. Joseph's requested a copy of the written findings of fact, conclusions of law and decision required of the Committee by the Missouri CON Law and the Committee's own regulations. See, Mo.Rev.Stat. §197.330.1(5); 13 C.S.R. 60-3.050(7). (App. at 6.) The Committee refused to supply any findings or conclusions declaring that they are unnecessary when an application is approved. (*Id.*)

C. **Circuit Court Proceedings.**

On March 1, 1983, St. Joseph's filed a two count Petition seeking judicial review of the Committee's decision pursuant to the Missouri Administrative Procedure and Review Act, Mo.Rev.Stat. §§536.100 and 150 (1978), and the Missouri Declaratory Judgment Act, Mo.Rev.Stat. §527, *et seq.* (1978). (App. at 6.) Count I sought a declaration that the Committee's decision was void for lack of supporting findings and conclusions. (*Id.*) Count II sought to enjoin Pacific Care from developing its proposed nursing home until it obtained a valid certificate of need.

After agreeing to the facts of the case St. Joseph's and Pacific Care filed cross motions for summary judgment. St. Joseph's argued that the Committee's decision was void as a matter of law because of the failure to issue findings and conclusions. (App. at 6.) Pacific Care did not dispute that the Committee's decision was void for lack of findings and conclusions. Instead, Pacific Care argued that St. Joseph's lacked standing to seek judicial review of the Committee's decision. (App. at 7.)[3] Pacific Care contended that St. Joseph's competitive interests were insufficient to confer standing and that the Missouri CON Law only gave applicants appeal rights. See, Mo.Rev.Stat. §197.335 (1984 Cum.Supp.) ("Within thirty days of the decision of the committee, the applicant...may file an appeal....").[4]

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[3]Pacific Care also argued that its application was "automatically" approved notwithstanding the lack of findings and conclusions. (App. at 3.) An automatic approval can occur when the Committee fails to decide a certificate of need application within certain statutorily prescribed review periods. *See,* Mo.Rev.Stat. §197.330.2 (1984 Cum.Supp.) The Circuit Court found against Pacific Care on this issue. Neither the Missouri Court of Appeals nor the Missouri Supreme Court reached the issue. (App. at 34-35.)

[4] Section 197.335 also gives health systems agencies the right to appeal Committee decisions. Health systems agencies were created by the NHPRDA as voluntary health planning entities. *See,* 42 U.S.C.

The Missouri Attorney General, on behalf of the Committee, supported Pacific Care's position on standing before the Circuit Court.

St. Joseph's responded that it had standing for two reasons. First, St. Joseph's argued that it was "aggrieved" by the stipulated injury to its competitive interests and entitled to review under Missouri law. Alternatively, St. Joseph's urged that a review right must be implied in the Missouri CON Law in order to comply with the requirement in the NHPRDA that all state certificate of need programs give area health care providers standing to seek judicial review of certificate of need decisions. See 42 U.S.C. §300n-1(b)(12)(E).

On July 15, 1983, the Circuit Court entered judgment for St. Joseph's declaring the Committee's decision void for lack of findings and conclusions and enjoining Pacific Care from developing its proposed nursing home. (App. at 31-32.) With respect to standing, the Circuit Court found that St. Joseph's was aggrieved by the injury to its competitive interests and, therefore, entitled to seek judicial review under Missouri law. (App. at 17.) In addition the Circuit Court implied a review right for area health care providers under the Missouri CON Law because of the federal requirement found in the NHPRDA for such review rights. (App. at 19-20.)

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§300L-1(b)(1); 42 C.F.R. §122.02. *See generally, National Gerimedical Hospital v. Blue Cross,* 452 U.S. 378, 384-85 (1981).

The Missouri CON Law, when enacted in 1980, provided for health systems agency participation in the certificate of need process as mandated by the NHPRDA. *Compare, e.g.,* 42 U.S.C. §300n-1(b)(4) (applications must be submitted to the appropriate health systems agency for review), *with,* Mo.Rev.Stat. §197.325.2 (1984 Cum.Supp.)(applicants must submit applications to both the Committee and the appropriate health systems agency for review).

Health systems agencies, however, no longer exist in Missouri. Pursuant to 42 U.S.C. §300n-5 Missouri's Governor Bond terminated all health systems agencies in 1982. (App. at 45.) Consequently only applicants for certificates of need are authorized to appeal Committee decisions under the Missouri CON Law.

D. **Court of Appeals Proceedings.**

On August 24, 1983, Pacific Care appealed to the Missouri Court of Appeals Eastern District. (App. at 34.) Pacific Care did not dispute the Circuit Court's decision on the merits, but only contested St. Joseph's right to seek review. (App. at 35.) The Missouri Attorney General did not appeal the decision. (*Id.*)

On May 22, 1984, the Court of Appeals handed down its Opinion reversing the Circuit Court on the standing issue. The Court found that St. Joseph's competitive interests were insufficient as a matter of law to give St. Joseph's standing under Missouri law and that the Missouri CON Law denied review rights to area health care providers. (App. at 35.)

With regard to the federal requirement for such review rights in the NHPRDA, the Court of Appeals acknowledged that Missouri enacted its CON Law "in response to the National Health Planning and Development Act . . . *and more specifically Secs. 300m-6 and 300n-1.*" (App. at 35, emphasis added.) The Court of Appeals also recognized that the NHPRDA "does establish an optional program which a state *must implement* in order to receive federal funds allocated by the act." (*Id.*)

Notwithstanding those conclusions, the Court of Appeals held that Missouri is not obligated to follow the NHPRDA and that the NHPRDA does not require review rights for area health care providers. The Court of Appeals stated:

> We note in passing that the Missouri law differs from the federal act in several respects. [citation omitted] In addition the review criteria of the federal act provides as a minimum that review be provided for those "adversely affected by a final decision . . ." 42 U.S.C. 300n-1(b)(12)(E). "Adversely affected" is not further defined. Only when the regulations promulgated by the Secretary are reached do we find an expressed federal policy to allow appeals by

> competitive health providers. 42 C.F.R. 123.410(a)(14) and 123.401. Even those guidelines are not mandatory upon the states . . . . (App. at 43-44.)

On June 6, 1984, St. Joseph's moved for rehearing by the Court of Appeals, or transfer to the Missouri Supreme Court. St. Joseph's argued that the Court of Appeals erred with regard to the federal requirement for review rights. The Court of Appeals denied St. Joseph's Motion in a Per Curiam Opinion rendered on July 10, 1984, without discussing the federal requirement for review rights. (App. at 45.)

E. **En Banc Missouri Supreme Court Proceedings.**

On July 25, 1984, St. Joseph's applied to the Missouri Supreme Court for discretionary review of the Court of Appeals Opinion. St. Joseph's argued that the Court of Appeals Opinion rendered the Missouri CON Law invalid under the Supremacy Clause of the United States Constitution by failing to accord St. Joseph's a review right as required by the NHPRDA.

By Order dated September 11, 1984, the Missouri Supreme Court accepted this case for En Banc plenary review. (App. at 47.) The issue of standing was once again fully briefed by St. Joseph's and Pacific Care. St. Joseph's reiterated that Missouri was obliged by the NHPRDA to recognize review rights for area health care facilities because of the Supremacy Clause. Pacific Care did not dispute that the NHPRDA provided for review rights in persons such as St. Joseph's. Instead, Pacific Care argued only that the NHPRDA was not mandatory on the states.

By this point, the litigation had attracted a number of amici representing hospital and nursing home interests throughout Missouri. The amici became involved because of the pendency of their own Committee review actions wherein the standing issue was involved. The seven amici, and their attorneys,

represented twenty other Committee review proceedings. The amici and other Missouri litigation impacted by this case are set out at Appendix at J.

Following oral argument the En Banc Missouri Supreme Court decided not to decide the case. Instead the Court retransferred this action, without opinion or directions, to the Court of Appeals Eastern District by Order dated January 23, 1985. (App. at 49.) The Court of Appeals then reinstated its earlier Opinion by Order dated January 29, 1985. (App. at 51.)

REASONS FOR PLENARY CONSIDERATION

I.

The Court Below Has Decided An Important Question Of The Relationship Between State And Federal Law That Can Only Be Resolved By This Court.

The question involved in this case—the obligation of the states to follow the NHPRDA—is fundamental to the nation's effort to control health care costs. The decision below emasculates that effort by disregarding the federal mandate for judicial review and thereby removing the only check on the delegated state regulation of institutional health care costs.

The decision below is of widespread importance, not only for twenty cases affected in Missouri alone, but because 44 states have certificate of need programs. Questions as to the obligation to recognize the minimum procedures in the NHPRDA can only be multiplied by the decision below.

A. The decision below emasculates the Congressional scheme to control institutional health care costs by removing the only check on state certificate of need decisions.

This Court has recognized that Congress, through the NHPRDA, created the state certificate of need program "as the basic component in an overall effort to control capital expenditures which contribute so greatly to the total national health bill." *National Gerimedical Hospital v. Blue Cross,* 452 U.S. 378, 385-86 (1981), quoting, S.Rep. 96-96 at 5 (1979), reprinted in, 1979 *U.S. Code Cong. and Admn. News,* 1306, 1310. See generally, Bovbjerg, *Problems and Prospects for Health Planning: The Importance of Incentives, Standards and Procedures in Certificate of Need,* 1978 Utah L. Rev. 83 ("Certificate-of-need laws provide the central regulatory mechanism—the 'teeth'—in the elaborate health planning structure established by the [NHPRDA]").

The certificate of need program concept is very simple:

> The essence of the certificate-of-need program is the requirement that any proposed construction of or significant capital expenditure for health care facilities in a state be certified to be necessary by the State Agency before it is offered. The program is intended to reduce unnecessary duplication in health care facilities and thereby, it is hoped, reduce the cost of health to consumers. (*Greater St. Louis Health Systems Agency v. Teasdale,* 506 F.Supp. 23, 28 (E.D.Mo. 1980).)

Under the certificate of need scheme the nation's supply of institutional health care services, such as hospital and nursing home care, is allocated by a public determination of need according to objective criteria, akin to the system of utility regulation. See, *Phoenix Baptist Hospital and Medical Center v. Samaritan Health Services,* Slip Op. No. 81-5848 at 5 (9th Cir., Aug. 25, 1982) ("The state systems of awarding certificates of need represents a statutory division of markets."); Bovbjerg, *Problems and Prospects for Health Planning: The Importance of Incentives, Standards, and Procedures in Certificate of Need,* 1978 Utah L. Rev. 83 ("Certificate-of-need laws require public scrutiny and approval of important health care investments before they are made and are intended both to eliminate immediate unnecessary capital costs, and, ultimately, to lower facilities' operating costs."); Havinghurst, *Regulation of Health Facilities and Services By "Certificate of Need",* 59 Virginia L. Rev. 1143, 1153-55 (1973) ("Certificate-of-need laws establish entry controls which are similar in intent and impact to the certificate-of-public-convenience-and-necessity device widely employed in public utility and common carrier regulation.").

Congress found certificate of need regulation necessary because "the effect of competition on decisions of providers respecting the supply of health services and facilities is diminuted." 42 U.S.C. §300K-2(b)(1). See also, S.Rep. 96-96 at 52 (1979), reprinted in 1979 *U.S. Code Cong. and Admn*

News, 1306, 1357 ("In the view of the committee the health care industry has not responded to classic marketplace forces.")

Although many factors contributed, Congress found that the "primary source of the lessening of [competition] is the prevailing methods of paying for health services by public and private health insurers ...." 42 U.S.C. §300K-2(b)(1). See also, 42 U.S.C. §300K(a)(2) and (4); S.Rep. 96-96 at 52-53 (1979), reprinted in 1979 *U.S. Code Cong. and Admn News,* 1306, 1357-58. The cost reimbursement systems of paying for health care not only pays providers for all facilities and services, regardless of need, but also encourages providers to add capacity because the "cost" of the capacity, needed or not, will be paid. See, H.Rep. 96-218 at 3-4 (1983); Havinghurst, *Regulation of Health Care Facilities By "Certificate-of-Need",* 59 Virginia L. Rev. 1143, 1156-1160 (1973).

Without certificate of need regulation Congress found that the burgeoning cost of health care, now exceeding 10% of GNP or $332 billion, was being inflated by billions in excess capacity. See, Note, *Antitrust and Certificate of Need: A Doubtful Prognosis,* 69 Iowa L. Rev. 1451 (1984) (quoting Department of Health and Human Services' figures). See generally, S.Rep. 96-96 at 5 (1979), reprinted in, 1979 *U.S. Code Cong. and Admn News,* 1306, 1310. For example, hospitals were found to have built 130,000 unneeded beds. (*Id.* at 53, 1358). Not only were billions wasted on the construction of unnecessary hospital beds, but Congress also found that one third of that capital cost was incurred each year thereafter as additional operating cost. (*Id.*) See generally, H.Rep. 98-218 at 4 (1983) ("[T]here are fixed costs associated with idle capacity...an unused hospital bed is estimated to generate between 20 and 65 percent of the costs of a filled bed."); Bovbjerg, *Problems and Prospects for Health Planning: The Importance of Incentives, Standards, and Procedures in Certificate of Need,* 1978 Utah L. Rev. 83, 87 ("Costs increase because the extra capital spending adds depreciation and interest charges to hospital expenses, whether

or not the asset is utilized."). By enacting a mandatory certificate of need program Congress sought to vastly improve upon the $1.8 billion in capital costs avoided by prior voluntary health planning efforts. See, S.Rep. 96-96 at 52 (1979), reprinted in, 1979 *U.S. Code Cong. and Admn News,* 1306, 1357.

Through the NHPRDA with its 1979 amendments, Congress mandated that "all states must develop a certificate of need program which assures that only those services, facilities, and organizations which are found to be needed by those planning agencies are offered or developed in the State." S.Rep. 96-96 at 41-42 (1979), reprinted in, 1979 *U.S. Code Cong. and Admn News,* 1206, 1346-47. The Secretary of Health and Human Services ("HHS") was directed to enter into designation agreements with each state. See, 42 U.S.C. §300m(a). HHS was required to designate only those states that had a certificate of need program that embodied the minimum federal requirements contained in the NHPRDA. See, 42 U.S.C. §§300m-1(b)(5); 300m-2(a)(4)(A) and 300m-6(a)(2)(B).

The minimum federal requirements for a State certificate of need program are set forth in 42 U.S.C. §300n-1. The key requirement for state certificate of need programs is the mandate that the designated state agency decide applications for certificates of need by issuing findings of fact and conclusions of law that are based solely upon the record developed by a mandatory application and adversarial hearing procedure before the state agency. See generally, 42 U.S.C. §§300n-(b) and (c).

Because Congress had vested control over the purse strings to the nation's health care dollars in state agencies, it was concerned that the state agency would be coopted by health care providers. See, S.Rep. 96-96 at 52 (1979), reprinted in, 1979 *U.S. Code Cong. and Admn News,* 1306, 1357. See also, Miller, *Antitrust and Certificate of Need: Health Systems Agencies, the Planning Act, and Regulatory Capture,* 68 Georgetown L.J.

873, 882 (1980). The only check placed by Congress on the decision of a state agency to issue a certificate of need was the requirement that such decision be subject to judicial review by area health care providers. Thus Congress mandated that "[a]ny person adversely affected by a final decision of a State Agency with respect to a certificate of need ... may ... obtain judicial review of it in an appropriate State court." 42 U.S.C. §300n-1(b)(12)(E). That "affected persons" includes area health care providers was declared unequivocally by Congress:

> Section 133 of the committee's bill [now 42 U.S.C. §300n-1(b)(12)(E)] provides that any person who is adversely affected by a final decision of the State Agency pursuant to paragraphs (4), (5), or (6) of section 1523(a) [42 U.S.C. §300m-2(a)(4)-(6)] may, within a reasonable period of time after such decision is made and any review is made pursuant to paragraph (13), obtain judicial review of such a decision in an appropriate State court.
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> * * * *
>
> The committee further intends that any person "*adversely affected*" *includes any provider in the health service area* affected by an agency action, a provider in a different health service area if the proposal under review could adversely affect that provider, and any other person who participated in a proceeding before the agency. (S.Rep. 96-96 at 72 (1979), reprinted in, 1979 *U.S. Code Cong. and Admn. News,* 1377, emphasis added.)

See also, 42 C.F.R. §123.410(a)(14).

The role of judicial review of certificate of need decisions by competitors is singularly critical to the health planning goals of the NHPRDA. This is because competitors have the means and the motive to vigorously contest need determinations for the addition of new institutional health services. As the Court in *Matter of Wilksboro, Ltd.,* 285 S.W.2d 626 (N.C. App. 1982),

observed when finding standing for competitors to challenge certificate of need decisions:

> We believe that Vespers, Inc. which operated a nursing care facility in Wilkes County was injuriously affected by DHR's decision - that Wilksboro ... need not apply for a certificate. *As a prospective competitor, Vespers had a substantial stake in the outcome of the controversy that would cause it to seek full adjudication of the issue it sought to raise. This Court can, in fact, think of no better person to assure complete review of this issue.* (285 S.W.2d at 430.)

Thus judicial review by area health care providers supplies the only meaningful check on state agency decisions to issue certificates of need.

The decision below eliminates judicial review of decisions to issue certificates of need by erroneously ignoring the mandate in the NHPRDA for such review. Under the Court of Appeals formulation only an applicant can appeal Committee decisions. Because no applicant will ever seek review of an approval, the decision below immunizes Committee approvals from any review. Yet decisions authorizing new institutional health services were precisely those which Congress sought to suppress when enacting the NHPRDA because of the existing overcapacity in the health care industry.

Eliminating judicial review vitiates the entire certificate of need program by removing the only mechanism for making state agencies accountable for their decisions. The experience in Missouri is demonstrative. Without judicial review the Committee has approved 94% of all applications for new institutional health services for the past five years. See, *Governor's Task Force On Health Care Costs Final Report,* 51 (1984). In 1983 alone, the Committee authorized an additional $369 million of new hospital and nursing home construction. See, *Summary of Activity in the Missouri Certificate of Need Pro-*

gram - Calendar Year 1983, 39 (1984). Although some of those projects may have been worthy of approval, many were deemed unnecessary by SHPDA, the Committee's own independent evaluation arm. For instance, in the case of new nursing home construction, the Committee, in 1983 alone, approved fourteen new nursing homes, costing $33.6 million, that will add 1000 nursing home beds to Missouri. See, *Governor's Task Force on Health Care Costs Final Report,* 51-52 (1984). SHPDA found only five of those projects needed. (*Id.*) Moreover, all of this new construction is for a State which has 15,501 excess nursing home beds and over 6,000 excess hospital beds. See, *Summary of Activity in the Missouri Certificate of Need Program - Calendar Year 1983,* 50 and 54 (1984). Indeed the Missouri State Health Plan, adopted by the Committee as part of its own regulations, has declared Missouri as overbedded since the 1980 inception of certificate of need in the state. See 13 C.S.R. 60-4.010 (Editor's Note).[5]

Without judicial review, the Committee can escape accountability for its decisions by failing to issue findings and conclusions as required by the NHPRDA and Missouri law. See, 42 U.S.C. §300n-1(b)(6); 42 C.F.R. §123.410(a)(11)(v); Mo. Rev. Stat. §197.330.1(5); 13 C.S.R. 60-3.050(8). In this case, for instance, the Committee's own State Health Plan listed the area proposed to be served by Pacific Care as overbedded and directed that no new nursing homes be approved until all existing area nursing homes experienced a 95% occupancy. See, *Missouri State Health Plan - Medical Facilities Appendix* at 90-93 (1983 ed.). SHPDA found that there was an excess of nur-

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[5] Columbia, Missouri has the distinction of being the second most overbedded city in the country with 1,678 hospital beds for 60,000 population, or 16 beds per 1000 population. *See,* "Columbia, Mo., Hospitals Stage Advertising Blitz" *Modern Health Care* 97 (May 24, 1985). The Missouri State Health Plan sets the maximum ratio of hospital beds to population at 4/1000. *See,* 13 C.S.R. 60-4.010 (Editor's Note). *Cf.* 42 C.F.R. §121.201(a) (Establishing as a national health goal a hospital bed to population ratio of 4/1000.).

sing home beds in the area and that occupancy at existing area nursing homes was below 95%. (App. at 56.) Pacific Care never disputed these facts during the proceedings below. Notwithstanding, the Committee, with the minimum quorum and minimum vote, approved Pacific Care's application. By refusing to issue the required findings and conclusions, the Committee never had to justify its decision to allow $3 million in unnecessary capital expenses that would create $1 million in unnecessary annual operating costs.

In sum, the Congressionally appointed guardian of the nation's health care dollars is the state certificate of need agency. The only check placed on those agencies is the requirement that decisions to issue certificates of need be made subject to judicial review. The decision below emasculates this system by eliminating judicial review. This Court should review the decision below because of its importance to the Congressional effort to control the nation's health care costs.

B. **The decision below establishes a precedent of nationwide impact for the operation of the NHPRDA's certificate of need program and will produce conflicting interpretations of the program.**

The impact of the decision below will be felt nationwide because 44 states currently operate certificate of need programs pursuant to the NHPRDA. See, H. Rep. 98-218 at 9 (1983).[6] This is because most state certificate of need laws accord standing to those who are "aggrieved" by certificate of need decisions. See, Simpson & Bogue, *The Guide to Health Planning* at xxxvi (Western Center for Health Planning, 1984). Because the court below found that area health care providers are not "ag-

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[6] At the time of the House Report only Louisiana lacked a certificate of need program. Since that time five other states have intitiated experiments to control health care costs that have eliminated certificate of need. *See, Medicare and Medicaid Guide,* CCH Report No. 460 (May 17, 1985).

grieved" by the issuance of a certificate of need, and that the NHPRDA is nonbinding on the states, the precedent is established for eliminating judicial review of certificate of need decisions.

Judicial review actions of certificate of need decisions, until the decision below, have been a pervasive component of the effort to control health care costs. As of 1984 some 256 reported cases had been rendered by the courts of 45 states arising out of certificate of need decisions. See, Simpson & Bogue, *The Guide to Health Planning* at 301-330 (Western Center for Health Planning, 1984). Although not all of these cases directly involved the question of standing; "standing has been an issue in many cases." Simpson & Bogue, *supra* at xxxvi. This compilation does not include any pending actions involving standing; of which there are twenty in Missouri alone.

The influence of the decision below is already being felt in the certificate of need programs of other states. For instance, in Connecticut three hospitals are seeking to challenge the issuance of a certificate of need to Medical Management Corporation for the establishment of a free-standing ambulatory surgical center. See, *Bridgeport Hospital v. Commission on Hospitals and Health Care,* No. CV83-0207394S (Sup. Ct. for Jud. Dist. of Fairfield at Bridgeport, Conn.); *St. Vincent's Medical Center v. Commission on Hospitals and Health Care,* No. CV83-207405S (Sup. Ct. for Jud. Dist. of Fairfield at Bridgeport, Conn.); *Park City Hospital v. Commission on Hospitals and Health Care,* No. CV83-0207718S (Sup. Ct. for Jud. Dist. of Fairfield at Bridgeport, Conn.). In each case the hospital's right to seek review is being contested based on the decision below.

In addition to affecting certificate of need programs in other states, the decision below is in conflict with other decisions finding standing for area health care providers. See, e.g., *Hollingsworth v. Harris,* 608 F.2d 1026 (5th Cir. 1979) (Interpreting Mississippi law); *Sisters of Providence in Washington, Inc. v.*

Department of Social Services, 648 P.2d 970 (Alaska 1982); *Memorial Hospital of Southern California v. State Health Planning Council,* 28 Cal. App. 3d 167, 104 Cal. Rptr. 492 (1972); *Suburban Medical Center v. Olathe Community Hospital,* 597 P.2d 645 (Kan. 1979); *Hale v. Petit,* No. CV81-2 (Me. Super. Ct. Kennebee County, Feb. 28, 1981), *aff'd on other grounds,* 438 A.2d 226 (Me. 1981); *Twin Ports Convalescent, Inc. v. Minnesota State Board of Health,* 257 N.W.2d 343 (Minn. 1977); *Home Health Agency Assembly of New Jersey, Inc. v. Homemakers International Co.,* No. A-3667-76 (N.J. Super. Ct. Div., June 23, 1978); *In re Wilksboro, Ltd.,* 285 S.E.2d 626 (N.C. App. 1982); *Tulsa Area Hospital Council v. Oklahoma Health Planning Commission,* No. C-78-972 (Okla. Dist. Ct. Tulsa County, Dec. 1, 1978), *rev'd on other grounds,* 626 P.2d 316 (Okla. 1981). The decision below will promote conflicts among the states with respect to the NHPRDA by denying standing to area health care providers. This conflict is particularly vexatious for health planning because the nation as a whole pays for the results of each state's certificate of need programs though insurance and tax supported health plans such as Medicare and Medicaid.

Moreover, the question of the interrelationship between the NHPRDA and state certificate of need programs is a recurring one. As noted above there are hundreds of cases throughout the country interpreting and applying the certificate of need laws. Those cases, however, are in conflict as to the states' obligation to obey the minimum requirements in the NHPRDA. Not surprisingly the federal courts have found preemption while state courts, in general, have not. Compare, e.g., *Save our Samaritan v. Bay Medical Center and Bay City Samaritan Hospital,* No. 79-10297 (E.D. Mich. July 13, 1981); *Greater St. Louis Health Systems Agency v. Teasdale,* 506 F.Supp. 23 (E.D.Mo. 1980); *Goodin v. State ex rel. Oklahoma Welfare Commission,* 436 F.Supp. 583 (W.D. Okla. 1977); *Park East Corporation v. Califano,* 435 F.Supp. 46 (S.D.N.Y. 1977) [All

finding the requirements of the NHPRDA mandatory on the states], with, e.g., *Village of Herkimer v. Axelrod,* 451 N.Y.S.2d 303 (App. 1982), *aff'd on other grounds,* 462 N.Y.S.2d 633 (Ct. App. 1983); *East Tennessee Health Improvement Council, Inc. v. Tennessee Health Facilities Commission,* 626 S.W.2d 272 (Tenn.App. 1981); *Wisconsin Hospital Association v. State Department of Health,* No. 82-CV-2653 (Dane County Cir. Ct., Wis., Mar. 8, 1983), [All finding that the NHPRDA was not mandatory on the states].

The pernicious effect of this conflict is that providers of health care in a particular state may face differing standards for certificate of need depending upon whether they are in a federal or state forum. In Missouri, for example, the District Court in *Greater St. Louis Health Systems Agency v. Teasdale, supra* found that Missouri was obligated under the Supremacy Clause to conform its certificate of need law to the requirements of the NHPRDA. The Court below, however, has declared that the Missouri CON Law was not preempted by requirements in the NHPRDA.

This Court should review the decision below because it affects the NHPRDA's certificate of need programs in 44 states. The issue of judicial review is fundamental to those certificate of need programs as evidenced by the great number of cases where judicial review is sought from state decisions.

II.

The Court Below Has Decided An Important Question Of Constitutional Import That Conflicts With Applicable Decisions Of This Court.

The decision below holds that states are not obligated to follow the minimum requirements contained in the NHPRDA because those requirements are not mandatory on the states. Congress, however, was adamant in preempting state law when enacting the NHPRDA. As Representative Satterfield stated during floor debate on the NHPRDA:

> Now I have listened with great interest to the question about preemption of States. There is no one in this body who will stand stronger for States rights than I or oppose preemption of States rights to do things; *but let us not make any mistake about it, when we passed the Health Planning and Resources Development Act in the first instance, we preempted the States in the area of certificate of need and they are preempted now.* (Cong. Rec. July 19, 1979, 19555, emphasis added.)

The only flexibility Congress allowed the states was to enact more stringent standards than those minimum requirements contained in 42 U.S.C. §300n-1. See, S. Rep. 96-96 at 43 (1979), reprinted in, 1979 *U.S. Code Cong. and Admn News,* 1306, 1348 and 1348n.2 ("The certificate-of-need programs vary with each State, consistent with Federal requirements....State certificate-of-need programs may be more stringent or more comprehensive than the minimum Federal certificate-of-need standards.") Cf. *State of North Carolina ex rel. Morrow v. Califano,* 445 F.Supp. 532 (E.D.N.C. 1977), *aff'd mem.,* 435 U.S. 962 (1978) (Finding imposition of federal requirements for certificate of need programs a proper constitutional exercise of Congress' spending power.).

Given the clear purpose of Congress to preempt state certificate of need programs under the NHPRDA, the decision below is contrary to this Court's view of the Supremacy Clause of the U.S. Constitution. See, U.S. Const. art. VI, cl. 2. Just last term this Court decided two cases accepted on appeal that presented the same question as raised here. In *Michigan Canners and Freezers Association, Inc. v. Agricultural Marketing and Bargaining Board,* ____ U.S. ____, 52 U.S.L.W. 4739 (1984), this Court considered whether Michigan was prohibited from coercing individual farmers to join cooperatives pursuant to state law under the cooperative farm program established by the Federal Agricultural Fair Practices Act ("AFPA"), 7 U.S.C. §2303(a). Finding an express Congressional intention to require only voluntary cooperative action, this Court held that:

> Because the Michigan Act authorizes producers' associations to engage in conduct that the Federal Act prohibits, it "stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress." *Hines v. Davidowitz,* 312 U.S. at 67. To that extent, therefore, the Michigan Act is pre-empted by the AFPA .... (52 U.S.L.W. at 4744.)

Similarly, in *Lawrence County v. Lead-Deadwood School Dist. No. 40-1,* ____ U.S. ____, 105 S.Ct. 695 (1985), this Court considered whether a South Dakota statute, mandating special uses for federal funds paid to local governments, in lieu of taxes on federal property, was preempted by the Payment in Lieu of Taxes Act, 31 U.S.C. §6901, *et seq.* This Court held that the South Dakota statute was preempted because Congress had specifically directed that states could not mandate any specific use for funds paid to local entities pursuant to the federal act. (105 S.Ct. at 703-704.)

The Court decision below ignores Congress' power to preempt state law in a way crucial to the fulfillment of the Congressional purpose to control health care costs under the NHPRDA's certificate of need programs. As shown in the previous section the lynchpin to Congress' entire certificate of need program is the accountability of state agencies, through judicial review, to render responsible decisions controlling the proliferation of new institutional health care services.

This Court should review the decision below to resolve the question of whether the NHPRDA is mandatory on state certificate of need programs. The decision below conflicts with this Court's pronouncements last term concerning Congress' preemption powers.

CONCLUSION

The decision below presents an issue of national importance which should be decided by this Court, and the decision is in conflict with decisions of this Court.

This Court should accept this appeal for plenary review.

Respectfully submitted,

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Dated: May 29, 1985

APPENDIX

APPENDIX A

STATE OF MISSOURI

SS.

COUNTY OF JEFFERSON

IN THE CIRCUIT COURT OF THE TWENTY-THIRD JUDICIAL CIRCUIT OF MISSOURI AT HILLSBORO, JEFFERSON COUNTY, MISSOURI
DIVISION TWO

Cause No. CV183-643-CC-J2

St. Joseph's Hill Infirmary, Inc.,
Plaintiff,

v.

Missouri Health Facility Review Committee,

and

Pacific Care Center, Inc.,
Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

This action involves a challenge by Plaintiff St. Joseph's Hill Infirmary, Inc. ("St. Joseph's") to a decision by Defendant Missouri Health Facilities Review Committee's ("the Committee") to grant Defendant Pacific Care Center, Inc. ("Pacific Care") a Certificate of Need to construct and operate a 120 bed nursing home in Pacific, Missouri. St. Joseph's claims the Certificate of Need issued is void because the Committee failed to issue supporting findings of fact and conclusions of law. Defendants claim that St. Joseph's lacks standing to challenge the Committee's decision. In addition, Pacific Care asserts the entire matter is moot because it was automatically given a Certificate of Need due to the failure of the Committee to issue its

decision within 120 days after Pacific Care's application was filed.

This matter is now before the Court on the parties' respective cross motions for summary judgment. Following a hearing and briefing on the issues by the parties, this Court finds that there is no dispute as to any material fact and concludes that as a matter of law St. Joseph's is entitled to judgment. Accordingly, this Court enters the following as its Findings of Fact, Conclusions of Law and Judgment:

FINDINGS OF FACT

A. Parties.

1. Plaintiff St. Joseph's Hill Infirmary, Inc. ("St. Joseph's") is a corporation duly formed and existing under the laws of the State of Missouri. (Pet. ¶1; Committee Ans. ¶1; P.C. Ans. ¶1.)* Its principal place of business and registered office is in Jefferson County, Missouri. (*Id.*) The Franciscan Missionary Brothers operate St. Joseph's and they, through their religious calling, are devoted to the care of the sick and elderly. (A.R. at 390.)** Two nursing homes are operated by St. Joseph's—Price Memorial and St. Joseph's Hill Infirmary. (*Id.*)

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* The parties, by their pleadings, have agreed to all of the facts material to this dispute. All facts so agreed are documented by reference to each parties' [sic] pleading and paragraph where the fact is admitted. All citations to St. Joseph's Petition shall be as such: "Pet. ¶____." All citations to the Committee's Answer shall be as such: "Committee Ans. ¶____." All citations to Pacific Care's Answer shall be as such: "P.C. Ans. ¶____."

** A certified copy of the administrative proceedings relating to Pacific Care's application was filed with this Court. All citations to this administrative record shall be to the page at which the referenced information appears such as "A.R. at ____."

2. Defendant Missouri Health Facilities Review Committee ("the Committee") is an agency of the State of Missouri sued here through its individual members in their official capacity only as members of the Committee, to wit: Rabbi Herbert J. Mandl, Chairman, Susan Bradshaw, Richard Hirshl, Tony Ribaudo, Stephen Spiegel, Gordon Warren, Richard Webster, John Dennis and Robert Young. (Pet. ¶2; Committee Ans. ¶2; P.C. Ans. ¶1.)

3. Defendant Pacific Care Center, Inc. ("Pacific Care") is a corporation duly formed and existing under the laws of the State of Missouri. (Pet. ¶3; Committee Ans. ¶3; P.C. Ans. ¶1.) Pacific Care's principal place of business is in Pacific, Missouri. (*Id.*) The corporation was formed to construct and operate a 120 bed nursing home in Pacific, Missouri. (*Id.*)

B. **Pacific Care's Certificate Of Need Application.**

4. By letter dated July 12, 1982, Pacific Care gave notice of its intent to file an application for a Certificate of Need to construct a 120 bed nursing home in Pacific, Missouri. (A.R. at 2.)

5. Pacific Care's proposed nursing home would be located within 15 miles from Price Memorial and St. Joseph's Hill Infirmary. (Pet. ¶1; Committee Ans. ¶1; P.C. Ans. ¶1; A.R. at 397.) Pacific Care's proposed facility and St. Joseph's two facilities would compete for the same patients. (Pet. ¶9; Committee Ans. ¶9; P. C. Ans. ¶3.)

6. By letter dated July 26, 1982, the State Health Planning and Development Agency ("SHPDA") responded to Pacific Care's July 12, 1982, letter of intent. (A.R. at 3.) SHPDA reported that the proposed 120 bed nursing home was subject to Certificate of Need review. (*Id.*)

7. On September 7, 1982, Pacific Care's application for a Certificate of Need was filed with SHPDA. (Pet. ¶5; Committee Ans. ¶5; P.C. Ans. ¶3; A.R. 4-125.)

8. By letter dated September 7, 1982, SHPDA notified Pacific Care that its Certificate of Need application would be reviewed for completeness beginning on September 7, 1982, and concluding on September 21, 1982. (A.R. at 125.)

9. By letter dated September 21, 1982, SHPDA informed Pacific Care that its Certificate of Need application was incomplete. (Pet. ¶6; Committee Ans. ¶6; P.C. Ans. ¶3; A.R. at 126-28.)

10. By letter dated September 24, 1982, Pacific Care transmitted supplemental information to SHPDA concerning its Certificate of Need application. (A.R. at 142.)

11. By letter dated October 15, 1982, SHPDA informed Pacific Care that with the supplemental information, the documentation requirements for the Certificate of Need application were met. (A.R. at 143.) SHPDA directed Pacific Care to pay a $1,500.00 application fee. (*Id.*)

12. By letter dated October 18, 1982, Pacific Care transmitted its check number 1, in the amount of $1,500.00 payable to SHPDA, to SHPDA. (A.R. 144-45.)

13. SHPDA declared Pacific Care's application complete as of October 19, 1982. (Pet. ¶6; Committee Ans. ¶6; P.C. Ans. ¶3; A.R. at 147.) By letter dated October 20, 1982, SHPDA informed Pacific Care of the completeness and reported that "[t]he review cycle [for the Certificate of Need application] began on October 19, 1982, and will end on January 14, 1983, unless extended another thirty days by the Missouri Health Facilities Review Committee." (A.R. at 147.)

14. Thereafter SHPDA gave notice of Pacific Care's Certificate of Need application to all affected persons by placing a legal notice in a newspaper of general circulation for the involved area. (Pet. ¶7; Committee Ans. ¶7; P.C. Ans. ¶3; A.R. at 148-49.)

15. Because a public hearing was requested by various affected persons, including St. Joseph's, SHPDA gave notice, by letters dated December 13, 1982, to all affected persons that a public hearing would be held on January 6, 1983, to consider Pacific Care's Certificate of Need application. (Pet. ¶9; Committee Ans. ¶9; P.C. Ans. ¶3; A.R. at 154-57.) In addition to the above letters, SHPDA also caused notice of the public hearing to be made in a newspaper of general circulation for the involved area. (A.R. at 158-59.)

16. By letter dated December 23, 1982, SHPDA gave notice to Pacific Care that the Committee had extended the review cycle an additional thirty days. (Pet. ¶8; Committee Ans. ¶8; P.C. Ans. ¶3; A.R. at 172.) The review cycle was deemed by SHPDA to end on February 12, 1983. (A.R. at 172.)

17. On January 6, 1983, a public hearing was held to consider Pacific Care's Certificate of Need application. (Pet. ¶9; Committee Ans. ¶9; P.C. Ans. ¶3.) Comments were heard from both proponents and opponents of the application. (A.R. at 177-231.) St. Joseph's appeared at the hearing and submitted documentary evidence and testimony in opposition to Pacific Care's Certificate of Need application. (Pet. ¶9; Committee Ans. ¶9; P.C. Ans. ¶3; A.R. at 204-212 and 232-273.)

18. On January 31, 1983, the Committee convened in Jefferson City, Missouri to consider, among other matters, Pacific Care's Certificate of Need application. (Pet. ¶10; Committee Ans. ¶10; P.C. Ans. ¶3.) A quorum of five Committee members was present to consider Pacific Care's application. (A.R. at 384.) After hearing testimony in support of the application, the Committee heard from opponents including St. Joseph's. (Pet. ¶11; Committee Ans. ¶11; P.C. Ans. ¶3; A.R. at 340-384.) As in the public hearing, St. Joseph's submitted documentary evidence and testimony in opposition to Pacific Care's Certificate of Need application. (*Id.*) Following St. Joseph's presentation SHPDA presented its report. SHPDA

concluded that, based on the availability of nursing home beds in the area: "additional beds would be unnecessary, duplicative, and potentially harmful to the functions of other providers within the market place. Therefore, it is recommended that this project not be granted a Certificate of Need." (A.R. at 402.)

19. At the conclusion of this evidence, the Committee voted 3-2 to approve Pacific Care's application. (Pet. ¶12; Committee Ans. ¶11; P.C. Ans. ¶3; A.R. at 34-42.)

20. By letter dated February 1, 1983, St. Joseph's requested a copy of the Committee's written findings of fact, conclusions of law and decision pursuant to Mo.Rev.Stat. ¶197.330.1(6) (1982 Cum.Supp.). (Pet. ¶13; Committee Ans. ¶13; P.C. Ans. ¶4; A.R. at 414.)

21. By letter dated February 7, 1983, the Committee's Chairman, Rabbi Mandl, provided Pacific Care with the written decision of the Committee approving the Certificate of Need application. (A.R. at 412-13.)

22. By letter dated February 10, 1983, SHPDA responded to St. Joseph's request for findings and conclusions. (Pet. ¶14; Committee Ans. ¶14; P.C. Ans. ¶5; A.R. at 415.) In its letter SHPDA stated that the Committee would not issue any written findings of fact and conclusions of law because the Committee believed that no such findings or conclusions are required when a Certificate of Need application is approved. (*Id.*)

C. **Proceedings.**

23. St. Joseph's filed this action on March 1, 1983, seeking in two counts declaratory and injunctive relief respectively. Count I asks that the Committee's approval of Pacific Care's Certificate of Need application be declared void for lack of written supporting findings of fact and conclusions of law. Count II seeks to enjoin Pacific Care from proceeding with the construction and operation of its proposed 120 bed nursing home on the grounds that it lacks a valid Certificate of Need.

24. The Committee answered on or about March 9, 1983, admitting all of St. Joseph's factual allegations but denying that St. Joseph's had standing to challenge the Committee's decision and that the Committee was required to issue written findings and conclusions to support a Certificate of Need approval. An Amended Answer was filed by the Committee on or about March 21, 1983, merely to make technical corrections to the pleading.

25. On March 18, 1983, St. Joseph's filed its Motion for Preliminary Injunction and set the matter for a hearing on April 14, 1983. That same day Pacific Care filed a Motion for Summary Judgment and set the matter for a hearing on April 14, 1983.

26. On April 14, 1983, this Court heard the parties on St. Joseph's Motion For Preliminary Injunction and Pacific Care's Motion for Summary Judgment. With the consent of all the parties, this Court ordered Pacific Care to answer the Petition and for the parties to submit Memoranda and Reply Memoranda on the legal issues in this case. The case would then be taken under submission by this Court for a judgment on the merits since the parties represented, and the pleadings reveal, that there is no dispute as to material issues of fact in this case.

27. Pacific Care filed its answer on or about April 16, 1983.

28. On May 6, 1983, St. Joseph's withdrew its Motion for Preliminary Injunction and filed its Motion for Summary Judgment on both Counts of its Petition.

29. Based upon the Memoranda thereafter submitted to this Court it is apparent that there are three primary legal questions that will dispose of this cause: (1) Whether St. Joseph's has standing to challenge the Committee's approval of Pacific Care's Certificate of Need Application; (2) Whether the Committee's approval is void for failure to submit supporting written findings of fact and conclusions of law; and (3) Whether

Pacific Care's application is automatically approved because the Committee failed to issue a written decision on the application within 120 days of filing.

D. **The Missouri Certificate of Need Law.**

30. In order to resolve the legal issues in this matter it is first necessary to understand the purpose and operation of the Missouri Certificate of Need Law. The Missouri Certificate of Need Law, Mo.Rev.Stat. §197.300, *et seq.* (1982 Cum.Supp.) (hereinafter sometimes referred to as the "Missouri CON Law"), was enacted as a component of a larger federal health planning program set forth in the National Health Planning and Resources Development Act of 1974, 42 U.S.C. §300k, *et seq.* ("NHPRDA"). See, *Greater St. Louis Health Systems Agency v. Teasdale,* 506 F.Supp. 23, 27 (E.D.Mo. 1980).

31. Although the NHPRDA has four components, the section relevant here is Subchapter XIII—National Health Planning and Development. Under the provisions of Subchapter XIII, Congress established a comprehensive planning scheme for health care in the United States. See, *Greater St. Louis Health Systems Agency v. Teasdale,* 506 F.Supp. 23, 27 (E.D.Mo. 1980).

32. The legislative purpose for Subchapter XIII of the NHPRDA was twofold. Congress wanted, first, to produce efficient investment in facilities so that health care costs would be reduced, and second, to avoid maldistribution of health care services. See, *National Gerimedical Hospital v. Blue Cross,* 452 U.S. 378, 386 (1981); 42 U.S.C. §300(K)(a); 1974 *U.S. Code Congressional and Administrative News,* 7842.

33. In order to achieve those two goals, the NHPRDA authorized the creation of a number of planning agencies at both the federal and state level. Although state participation was entirely voluntary, any state wishing to participate was required to create, or designate, a State Agency with power to ad-

minister a "certificate of need" program in compliance with federally prescribed guidelines. See, *National Gerimedical Hospital v. Blue Cross,* 452 U.S. 378, 386 (1981); *Greater St. Louis Health Systems Agency v. Teasdale,* 506 F.Supp. 23, 27-28 (E.D.Mo. 1980); 42 U.S.C. §§300m-2, 300m-6 and 300n-1; 42 C.F.R. ¶123.401 *et seq.;* 1979 *U.S. Code Congressional and Administrative News,* 1306.

34. The Certificate of Need program was intended by Congress to be "the basic component in an overall effort to control the unnecessary capital expenditures which contribute greatly to the total national health bill." S. Rep. No. 96-96 at 5 (1979), quoted in, *National Gerimedical Hospital v. Blue Cross,* 452 U.S. 378, 385-86 (1981).

35. The Certificate of Need concept was very succintly stated by the Court in *Greater St. Louis Health Systems Agency v. Teasdale,* 506 F.Supp. 23, 28 (E.D.Mo. 1980);

> The essence of the certificate-of-need program is the requirement that any proposed construction of or significant capital expenditure for health facilities in a state be certified to be necessary by the State Agency before it is offered. The program is intended to reduce unnecessary duplication in health care facilities and thereby, it is hoped, reduce the cost of health to consumers.

36. Minimum requirements for the certification process are provided for in the NHPRDA at 42 U.S.C. §300n-1. The statute also gives the Secretary of the Department of Health and Human Services ("HHS") power to establish regulations further defining minimum requirements for the certification process in addition to specific criteria in the statute itself. See, 42 U.S.C. §300n-1(a).

37. The basic scheme required by the NHPRDA is that any party proposing to build health facilities or add health services must apply for a Certificate of Need from the state before

building or adding the proposed facility or service. The application process must include a provision giving notice to all persons who may be affected by the proposal and allow for public hearing on the application. In rendering its decision on the merits of the application, the State Agency must consider the type of facility in relation to long term health planning, the need for the facility, any less costly alternatives, the population being served, the availability of resources to make the proposed operation feasible in terms of money and personnel, the effect on other existing health care facilities and a variety of other factors. 42 U.S.C. §300n-1(c). After consideration of those factors upon the administrative record generated through a hearing process, the State Agency is required to issue "written findings which state the basis for any final decision or recommendation by the...State Agency...." 42 U.S.C. §300n-1(b)(6). If the State Agency fails to either approve or disapprove the Certificate of Need application within a reasonable period of time, preferably 90 days but not necessarily, the "applicant may, within a reasonable period of time following the expiration of such period, bring an action in an appropriate State court to require the State Agency to approve or disapprove the application." 42 U.S.C. §300n-1(b)(12)(c)(ii). Finally, the Certificate of Need program must allow "[a]ny person adversely affected by a final decision of a State Agency with respect to a certificate of need...[t]o obtain judicial review...." 42 U.S.C. §300n-1(b)(12)(E).

38. The Secretary of HHS has supplemented these statutory requirements with regulations promulgated at 42 C.F.R. §123.401 *et seq.* First, the regulations require that the State Agency's decision approving or denying a certificate of need be supported by written findings:

> The procedures adopted and used by a State Agency for conducting the reviews covered by this subpart must include at least the following:
>
> * * * *

(6) *Written findings and conditions.* Provision for written findings...which state the basis for any final decision made by the State Agency....The State Agency shall send written findings to the applicant and to the health systems agency for the health service area in which the project is proposed, and shall make them available to others upon request.

* * * *

(10) *Statement of reasons.* Provision that if the State Agency makes a decision which is inconsistent with a recommendation made by the health systems agency, the goals of the applicable health systems plan, or the priorities of the annual implementation plan, the State Agency shall submit to the health systems agency and to the applicant, a detailed statement of the reasons for the inconsistency. (42 C.F.R. §123.410(a), emphasis in original.)

See also, 42 C.F.R. §123.410(a)(11)(V).

39. The HHS regulations also require that any person adversely affected by the decision of the State Agency on any particular Certificate of Need be entitled to judicial review of that decision. The same regulation cited above continues by requiring each state's Certificate of Need program to provide for:

(14) *Judicial review.* Provision that any person adversely affected by a final decision of a State Agency with respect to a certificate of need...may, within a reasonable period of time after the decision is made...obtain judicial review of it in an appropriate State court.

* * * *

(ii) For purposes of this paragraph, "persons adversely affected" shall include the State Agen-

> cy, any person who meets the definition of "affected person" in §123.401, and any person who participated in the proceeding before the State Agency. (42 C.F.R. §123.410 (a)(14), emphasis in original.)

Section 123.401 defines "affected persons" to include any "health care facilities...located in the health service area in which the project is proposed to be located which provides services similar to the services of the facility under review." 42 C.F.R. §123.401.

40. In 1979 Missouri began its participation in the NHPRDA programs by enacting the Missouri CON Law. Mo.Rev.Stat. §197.300 (1982 Cum.Supp.). See generally, *Greater St. Louis Health Systems Agency v. Teasdale,* 506 F.Supp. 23, 28 and 30-31 (E.D.Mo. 1980). The Missouri CON Law was designed expressly to meet federal guidelines. In fact the legislative effort was initially rejected by the Secretary of HHS for failing to meet the minimum requirements set forth in both the NHPRDA and HHS regulations discussed above:

> The present CON Law fails to comply fully with the requirements of applicable federal law and regulations. The Department of Health, Education and Welfare (now Health and Human Services) has so informed the State of Missouri. The Missouri State Health Planning and Development Agency of the Department of Social Servcies ("SHPDA") is in the process of preparing new certificate of need legislation and intends to submit it to the next session of the Missouri General Assembly. The SHPDA is relying partially upon federal recommendations in drafting this legislation. (*Greater St. Louis Health Systems Agency v. Teasdale,* 506 F.Supp. 21, 30-31 (E.D.Mo. 1980).)

After negotiations with HHS to ensure conformance to the federal requirements, the Missouri Certificate of Need Law went into full effect October 1, 1980. See Mo.Rev.Stat. §§197.300 and 197.315(5) (1982 Cum.Supp.).

41. The Missouri Certificate of Need Law creates the Missouri Health Facilities Review Committee to serve the role of the State Agency referred to in the federal statutes and regulations. See, Mo.Rev.Stat. §197.310 (1982 Cum.Supp.). After October 1, 1980, no person could develop or offer any new health service in the State of Missouri without first receiving a Certificate of Need from the Committee. See, Mo.Rev.Stat. §197.315 (1982 Cum. Supp.). The Committee was empowered to issue regulations supplementing its statutorily prescribed duties and procedures.

42. In order to obtain a Certificate of Need, a person wishing to develop or offer a new health service must submit an application to a health systems agency which processes the application for the Committee. See, Mo.Rev.Stat. §197.325 (1982 Cum.Supp.). As noted in *Greater St. Louis Health System Agency v. Teasdale,* 506 F.Supp. 21, 30-31 (E.D.Mo. 1980) [sic], the health systems agency in Missouri is SHPDA. Prior to filing the application, however, the applicant must first submit a letter of intent declaring that the applicant is proposing a new health service and, within thirty days, will submit an application. (*Id.*) Once the application is received it is reviewed for completeness. See, Mo.Rev.Stat. §197.330.1(1) (1982 Cum.Supp.). The completeness review must be accomplished within 15 days. (*Id.*) If the application is incomplete, the applicant is directed to supply additional information within the next thirty days. See, 13 C.S.R. 60-3.050(5). If the application is complete the application goes on to the next stage. In its Certificate of Need Handbook ("CON Handbook"), dated May 18, 1981, the Committee has stated that "[w]hen an application has been accepted as complete by the committee, it shall then be considered formally filed for purposes of review by the committee and the HSA." CON Handbook VI(E) (4).*

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* The CON Handbook was promulgated by the Committee to "provide a description of the Certificate of Need program and procedures to be followed by applicants, the HSA, the SHPDA, and the committee." CON Handbook Forward.

43. The next phase is to gather information about the application. Notice of the application must be given to all "affected persons and continguous [sic] health systems agencies." Mo. Rev. Stat. §197.330.1(2) (1982 Cum.Supp.). An "affected person" is defined as including "the person proposing the development of a new health care service, the public to be served, the health systems agency and health care facilities (which are defined as including "professional nursing facilities [and] practical nursing facilities" Mo.Rev.Stat. §197.305(7) (1982 Cum. Supp.)) within the service area in which the proposed new health care service is to be developed." Mo.Rev.Stat. §197.305(1) (1982 Cum.Supp.). If an affected person requests a public hearing on the application within thirty days after notice is given, a hearing must be held. See, Mo.Rev.Stat. §197.305.1(3) (1982 Cum.Supp.); 13 C.S.R. 60-3.050(5). During this same time SHPDA will be studying the application and shall prepare a report, within 60 to 90 days, to the Committee offering a recommendation as to whether the application should be approved. See Mo.Rev.Stat. §197.305.1(4) (1982 Cum.Supp.); 13 C.S.R. 60-3.050(4) and (6).

44. Following the public hearing, if requested, and the completion of SHPDA's report, the Committee shall meet and issue its decision. See, Mo.Rev.Stat. §197.330(5) (1982 Cum.Supp.); 13 C.S.R. 60-3.050(7). The Committee must render its decision within ninety days of the filing of the application for a Certificate of Need. (*Id.*) This period, however, may be extended another thirty days by the Committee. (*Id.*)

45. In rendering its decision on an applicant, the Missouri CON Law directs the Committee to "issue in writing its findings of fact, conclusions of law, and its approval or denial of the certificate of need...." Mo.Rev.Stat. §197.330.1(5) (1982 Cum.Supp.). See also, 13 C.S.R. 60-3.050(7). Although the Committee must consider many factors in rendering its decision

on an application,* it is directed to make findings on a number of matters if the application is approved. As the CON Handbook provides:

> In the issuance of a Certificate of Need, the committee shall make written findings as to—
>
> 1. The efficiency and efficacy of the use of existing inpatient facilities providing inpatient services similar to those proposed;
> 2. The capital and operating costs (and their potential impace [sic] on patient charges) efficiency and efficacy of the proposed new institutional health service;
> 3. The existence or not, of superior alternatives to such inpatient serices in terms of cost, efficiency and efficacy and that the development of such alternatives is not practicable;
> 4. The consideration of alternatives to new construction (e.g., modernization, or sharing arrangements) or that such alternatives have been implemented to the maximum extent practicable;
> 5. The experience by patients with serious problems in terms of cost, availability or accessibility or other such problems as may be identified by the committee in obtaining inpatient care of the type proposed in the absence of the proposed new service;
> 6. The relationship of the addition of beds for the provision of skilled nursing or intermediate care to the plans of other state agencies responsible for providing and financing long-term care...; and
> 7. The consistency of a proposal regarding the special needs and circumstances—

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* The CON Handbook lists some eighteen different factors the Committee "shall" consider at Section IX(1)-(18).

a. Of entities...which provide services/resources to individuals not residing in the health service areas where the entity is located, or in adjacent health service areas;
b. Of health maintenance organizations; or
c. Of biomedial [sic] and behavioral research projects. (CON Handbook IX(B).)

The Committee must send a copy of its written findings, conclusions and decision to any affected person who requests a copy. See Mo.Rev.Stat. §197.330.1(6) (1982 Cum.Supp.); 13 C.S.R. 60-3.050(8). The decision of the Committee can be appealed within thirty days after the final decision. See Mo.Rev.Stat. §197.330.2 (1982 Cum.Supp.); 13 C.S.R. 60-3.080; CON Handbook X.

46. The Missouri CON Law makes no mention of any right to review by an affected person other than giving an express right to review to the applicant, the Committee, and the affected Health Systems Agency. See Mo.Rev.Stat. §197.330.2 (1982 Cum.Supp.).

This Court, having been fully apprised of the undisputed facts as set forth above and the arguments of the parties as set forth in their respective Memoranda, does hereby conclude as follows:

CONCLUSIONS OF LAW

1. This Court possesses jurisdiction over the parties and the subject matter of this proceeding.

A. **Standing.**

2. Any person, whose private rights are affected by administrative agency action, is guaranteed the right to judicial review of that action by the Missouri Constitution Article 5, Section 18.

3. No statute can limit the Constitutional right to review, although the legislature can expand the right and define the method by which the right will be exercised. *See, e.g., Gaslight Real Estate Corp. v. Labor and Industrial Relations Com'n,* 604 S.W.2d 818, 820 (Mo.App. 1980); *State ex rel Missouri Power & Light v. Riley,* 546 S.W.2d 792, 797 (Mo.App. 1977); *Lafayette Federal Sav. and Loan Ass'n v. Koontz,* 516 S.W.2d 502, 504 (Mo.App. 1974); *State v. Public Service Com'n,* 366 S.W.2d 738, 742 (Mo.App. 1963); *State v. Stanton,* 311 S.W.2d 137, 140 (Mo.App. 1958).

4. In Missouri, the Constitutional right to review is accommodated with the legislatively prescribed method for review through the Missouri Administrative Procedure Act, Mo.Rev.Stat. §536.010 (1978) *et seq.* See, *Farmer's Bank of Antonia v. Kostman,* 577 S.W.2d 915, 921 (Mo.App. 1977); *Bank of Belton v. State Banking Board,* 554 S.W.2d 451, 453 (Mo.App. 1977).

5. A person is aggrieved by the action of an administrative agency such that the right to review is guaranteed when the agency action operates prejudicially and directly—with immediate consequence—upon a property right or interest. See, *Hertz Corp. v. State Tax Com'n,* 528 S.W.2d 952, 954 (Mo. 1975) (En Banc); *Bank of Belton v. State Banking Board,* 554 S.W.2d 451, 453 (Mo.App. 1977).

6. A competitor suffers the requisite economic injury to entitle it to judicial review when an administrative agency decides to allow a competing facility to operate in the same trade area. See, *Farmer's Bank of Antonia v. Kostman,* 577 S.W.2d 915, 920-21 (Mo.App. 1977); *Bank of Belton v. State Banking Board,* 554 S.W.2d 451, 453 (Mo.App. 1977).

7. This competitive injury exists when a Certificate of Need is granted to allow a competing health care facility to locate in the same trade area, or provide a new service, as an existing health facility. See, *The Washington University v. Missouri Health*

Facilities Review Committee, St. Louis County Circuit Court No. 481596, Findings of Fact, Conclusions of Law And Judgment filed May 20, 1983.

8. Because Pacific Care's 120 bed nursing home would compete with St. Joseph's two nursing homes for patients, St. Joseph's is aggrieved by the Committee's approval of Pacific Care's Certificate of Need application to construct and operate that nursing home within the meaning of the Missouri Constitution such that St. Joseph's has a right to seek judicial review of the Committee's approval.

9. Pacific Care's argument that St. Joseph's lacks the necessary interest to have standing is misplaced. In making the argument Pacific Care relies upon the rulings in *City of Richmond Heights v. Board of Equalization,* 586 S.W.2d 338 (Mo. 1979) (En Banc), and *State ex rel St. Francois S.D. R-III v. Lalumondier,* 518 S.W.2d 638 (Mo. 1975). In both cases, however, the Courts denied standing to the contesting party because only public rights were at stake. Both cases involve a public body challenging rulings affecting tax revenue. In each case the Courts were careful to note that the Missouri Constitution only grants standing to parties seeking review of decisions affecting "private rights." Here there is no question that the competitive interest St. Joseph's seeks to protect is a private right.

10. Both Pacific Care and the Committee argue that St. Joseph's lacks standing because the Missouri CON Law fails to expressly allow competitors review of Committee decisions. As noted above, however, St. Joseph's right to review is secured by the Constitution of Missouri independent of the Missouri CON Law.

11. Both Pacific Care and the Committee argue that the Committee's proceedings respecting Pacific Care's Certificate of Need application was not a contested case within the meaning of the Missouri APA and somehow conclude that therefore St.

Joseph's lacks standing. The argument is wrong for two reasons. First, the Missouri APA only sets forth the method of review. The right to review flows from the Constitution. Thus the fact that this is a contested case has absolutely no bearing on St. Joseph's standing under the Constitution. Second, even if it were true that this case was non-contested, the Missouri APA still authorizes this review action pursuant to Mo.Rev.Stat. §536.150 (1978) as a non-contested case. The simple fact is that regardless of whether the administrative proceedings are characterized as contested or non-contested, St. Joseph's status as an aggrieved party guarantees it the Constitutional right to seek judicial review in this Court. See, *Farmer's Bank of Antonia v. Kostman,* 577 S.W.2d 915, 921 (Mo.App. 1971).

12. Although this Court concludes that St. Joseph's has standing pursuant to the Missouri Constitution, authority for it to bring this review action can also be implied from the Missouri CON Law itself. When a statute neither expressly grants or denies a right to seek judicial review of an agency's action, as in the case of the Missouri CON Law, a private right to do so will be implied when it appears that the legislature intended such a right, the one seeking review belongs to the class for whose benefit the statute was enacted, and the private right would be consistent with the goal of the statute. See, *Shgeir v. Equifax, Inc.,* 636 S.W.2d 944, 947-49 (Mo. 1982) (En Banc). *Accord, Cort v. Ash,* 422 U.S. 66, 78 (1975).

13. The Missouri legislature's intention to accord affected parties, such as St. Joseph's, a right to review is found in the desire of the legislature to conform its CON Law to the federal requirements. As noted above both the NHPRDA and HHS regulations expressly require a state's CON Law to allow for judicial review of Certificate of Need decisions by affected persons. See 42 U.S.C. §300n-1(b)(12)(E); 42 C.F.R. §123.410(a)(14). The federal law defines an "affected person" to include health care facilities within the service area where the proposed facility is to be located. (*Id.*)

14. The intention of the Missouri legislature in enacting the CON Law was to comply with these federal requirements so as to be able to participate in the federal health planning process. See, *Greater St. Louis Health Systems Agency v. Teasdale,* 506 F.Supp. 23, 28 and 30-31 (E.D.Mo. 1980). At the time the Missouri legislature enacted the Missouri CON Law it was presumed to know of the federal law. See, *Kilbane v. Director of Dept. of Revenue,* 544 S.W.2d 9 (Mo. 1976); *State ex rel Danforth v. Milan C-11 School Dist.,* 446 S.W.2d 768 (Mo. 1969); *Reorganized School District v. John,* 312 S.W.2d 171 (Mo.App. 1958). Accordingly the Missouri legislature must have intended for affected persons, such as St. Joseph's, to have a right to seek judicial review of a Certificate of Need decision. To rule otherwise would render the Missouri CON Law inconsistent with the federal law, a result clearly not intended by the Missouri legislature.

15. It is also clear that St. Joseph's belongs to the class for whose benefit the Missouri CON Law was enacted. The purpose for the health planning system in general, and CON Laws in particular, is to prevent overbedding and maldistribution of health care services. One of the harmful consequences of unneeded beds is that it absorbs resources from a limited pool of available health care dollars. Thus existing health care providers are unable to meet their expenses out of existing revenues leading, in turn, to increased charges for care to both private pay and government reimbursed patients. By using the CON Law, the legislature hopes to eliminate excess beds by allowing development of new health services or facilities based strictly on a finding of need.

16. Obviously St. Joseph's belongs to the class for whom the CON Law was passed. If Pacific Care's proposed nursing home is erected, adding 120 beds, additional strains will be placed upon the health care budget of the area reducing the net dollar share to St. Joseph's. This in turn could lead to financial burdens on the citizens of Missouri receiving service at St.

Joseph's because of the revenue crunch. Thus the financial integrity of St. Joseph's qualifies it as a member of the class for whose benefit the Missouri CON Law was passed.

17. Finally, it is beyond dispute that allowing St. Joseph's a right to review will promote the goals and policies of the Missouri CON Law. This very lawsuit shows the role that an adversely affected person can play. The Committee, in direct violation of the Missouri CON Law and its own regulations approved Pacific Care's application without findings and conclusions. See, *infra* at ¶18-30. There is absolutely no record that there is any need for the project. That omission is particularly egregious in light of the detailed SHPDA report finding Pacific Care's facility unneeded. Hence independent of St. Joseph's Constitutional right to review, it has an implied right of action to seek review of Committee decisions under the Missouri CON Law.

B. The Need For Written Findings Of Fact And Conclusions of Law.

18. In interpreting the Missouri CON Law to determine whether findings and conclusions are required, this Court must give effect to the intention of the legislature. See, *City of St. Joseph v. Harkinson,* 312 S.W.2d 4 (Mo. 1958). Legislative intent is first determined by the plain language of the statute in question. See, *City of Willow Springs v. Missouri State Librarian,* 596 S.W.2d 441 (Mo. 1980). If the plain and ordinary meaning of the statute's language is unambiguous, the court's inquiry is at an end. See, *Hudson v. Marshall,* 549 S.W.2d 147 (Mo.App. 1977). Thus, it has been held that a court is barred from inserting or omitting words in an otherwise clear legislative enactment. See, *Welborn v. Southern Equipment Co.,* 386 S.W.2d 432, *appeal transferred to,* 395 S.W.2d 119 (Mo.App. 1964); *Wolfson v. Chelist,* 278 S.W.2d 39 (Mo.App. 1955), *aff'd,* 284 S.W.2d 447 (Mo. 1955). In particular a court is prohibited from adopting a construction that

limits plainly unqualified or universal language. See, *Pryor v. David,* 436 S.W.2d 3 (Mo. 1979).

19. The Missouri CON Law recites in unequivocal language that the Committee "shall...issue in writing its findings of fact and conclusions of law, and *its approval or denial* of the certificate of need...." (Mo.Rev.Stat. §197.330.1(5) (1982 Cum.Supp.), emphasis supplied.) The term "shall" is the legislature's statement that the Committee is required to render in writing the findings and conclusions. See, *State ex rel. Dreer v. Public School Retirement System,* 519 S.W.2d 290, 296 (Mo. 1975) (The use of shall indicates a mandate.); *Howard v. Banks,* 544 S.W.2d 601, 605 (Mo.App. 1976) ("[u]se of the work 'shall' indicates a mandate and will usually be interpreted to command the doing of whatever is required."); *State ex rel McTague v. McClellan,* 532 S.W.2d 870, 871 (Mo.App. 1976) (Shall "imposes such a duty upon a public officer [that] he has no discretion as to whether or not it should be performed.")

20. The Certificate of Need Law expressly provides that written findings and conclusions will be made when the Committee issues its "approval or denial" of the application. To assume that written findings and conclusions are necessary only when a certificate is denied flies in the face of the express, unambiguous and contrary language of the statute. As the authorities cited above make clear, this Court is barred from any interpretation striking the express mandatory requirement that written findings and conclusions support an "approval or denial" of a Certificate of Need. This Court, accordingly, concludes that the plain language of the Missouri CON Law requires the Committee to issue written findings of fact and conclusions of law to support an approval of a Certificate of Need application.

21. Even if the Missouri CON Law's language is ambiguous, this Court's resort to the rules of construction so as to divine the intent of the legislature, see, *Kieffer v. Kieffer,* 590 S.W.2d 915 (Mo. 1979), would confirm that findings and conclusions are required for a Certificate of Need application approval.

22. In so construing the Missouri CON Law, the Court must adopt a view that gives effect to the underlying purpose of the legislature in enacting the statute. See, *State v. White,* 622 S.W.2d 939 (Mo. 1981). This Court must assume that the legislature, when enacting the Missouri CON Law, was aware of the current state of the law including judicial construction of similar statutes. See, *Kilbane v. Director of Department of Revenue,* 544 S.W.2d 9 (Mo. 1976); *State ex rel Danforth v. Milan C-11 School District,* 446 S.W.2d 768 (Mo. 1979); *Reorganized School District v. John,* 312 S.W.2d 171 (Mo.App. 1958). Given that presumed knowledge, this Court must harmonize the Missouri Certificate of Need Law with other laws pertaining to the same subject matter, to wit the NHPRDA and HHS regulations. See, *Goldberg v. Administrative Hearing Commission of Missouri,* 609 S.W.2d 140 (Mo. 1980); *State v. Chadeayne,* 313 S.W.2d 757, *transferred to* 323 S.W.2d 580 (Mo.App. 1958).

23. The purpose of the Missouri CON Law is to comply with federal requirements for participation in the national health planning program. In that regard, the Missouri CON Law must be interpreted so that it harmonizes with the NHPRDA and the accompanying HHS regulations so that the Missouri legislature's goal of compliance with that program could be insured. A review of the federal requirements demonstrates that the Missouri legislature had to require the Committee to issue written findings and conclusions for three reasons:

(A) As a condition of participation in the NHPRDA program, the state Certificate of Need Law had to require the designated state agency to issue "written findings which state the basis for any decision or recommendation" on a certificate of need. 42 U.S.C. §300n-1(b)(6). The federal statute makes no exception to this requirement in cases where the Committee would approve a Certificate of Need. To the contrary federal law requires the state to issue written findings for *any* decision, favorable or unfavorable, on a Certificate of Need. See also, 42 C.F.R. §123.410(a)(11)(V)(6).

(B) Federal law also provides that the state laws require the Committee to issue written findings, in addition to all others, explaining why it decided a Certificate of Need application contrary to the recommendation of SHPDA. See, 42 C.F.R. §123.410(a)(11)(V)(10). Thus, in a situation, such as the one here, the Committee is obligated to state in writing, as part of its findings, the reason why it approved a Certificate of Need for a facility which SHPDA recommended against.

(C) Missouri's CON Law is consistent with federal law and meets the Missouri legislature's goal only if it is interpreted to require the Committee to issue written findings and conclusions for both approvals and denials of Certificates of Need. The clear command of the Missouri CON Law that the Committee shall issue written findings and conclusions for approvals and denials satisfies the federal requirements. To carve out some implied exception for approved Certificates of Need would render the Missouri CON Law inconsistent with the NHPRDA's express requirement that *any* decision be supported by written findings and with the requirement of written findings when, as here, the Committee's approval is inconsistent with the recommendation of SHPDA.

24. Not only is the legislature presumed to know federal law, the Missouri legislature is similarly presumed to have been familiar with this State's law, including judicial opinion, at the time the Missouri CON Law was enacted. See authorities cited above at ¶22. The legislature is presumed to have know [sic] that language nearly identical to that used to require findings and conclusions had been construed by the Courts of Missouri. Those judicial pronouncements were consistent in holding that "shall. . . be accompanied by findings of fact and conclusions of law" is considered to be a mandate that any decision of an administrative agency must be accompanied by those findings and conclusions or it is void. See, *Stephen & Stephen Properties, Inc. v. State Tax Com'n,* 499 S.W.2d 798, 804 (Mo. 1973). *Century State Bank v. State Banking Board,* 523 S.W.2d 856, 859 (Mo.App. 1975).

25. Mindful of the judicial interpretation of such language, it must be presumed that the legislature used the language requiring findings and conclusions because it intended to mandate such supporting documentation for all Committee decisions. To rule otherwise would mean that the legislature ignored, or was unaware of, this state's law when enacting the Missouri CON Law—a construction clearly impermissible under the authorities cited above.

26. In addition to harmonizing the Missouri CON Law with the relevant federal and state law, this Court must also interpret the statute so as to give effect and meaning to all the provisions of the statute because it is presumed that the legislature, in enacting the Missouri CON Law, did not create useless or meaningless provisions. See, *State ex rel Safety Ambulance Service, Inc. v. Kinder,* 557 S.W.2d 242 (Mo. 1977).

27. The Missouri CON Law is consistent internally only if it is read as requiring written findings and conclusions for all Committee decisions. As noted in the Findings of Facts [sic], a right to review the Committee's decision, whether it is approval or disapproval, is guaranteed to various parties. The right of review is rendered meaningless for Certificates of Need that are approved if no written findings or conclusions are required. The Courts of Missouri have long held that the only way review of administrative action is feasible is if there are written findings and conclusions to explain the basis for the Agency's decision. See, *Stephen & Stephen Properties, Inc. v. State Tax Com'n,* 499 S.W.2d 798, 804-805 (Mo. 1973); *Michler v. Krey Packing Co.,* 253 S.W.2d 136, 143 (Mo. 1952) (En Banc); *Hughes v. Board of Education,* 599 S.W.2d 254, 256 (Mo.App. 1980); *Century State Bank v. State Banking Board,* 523 S.W.2d 856, 858 (Mo.App. 1975).

28. The right to review the Committee's approval of a Certificate of Need is vitiated if the Missouri CON Law is read as not requiring findings and conclusions to support an approval. Such an absurd result, totally inconsistent with the general and

unqualified right to review cannot be presumed. In order to make the right to review consistent with the need for findings and conclusions, the legislature is presumed to have acted rationally so that both approvals and denials of Certificates of Need must be supported by written findings and conclusions.

29. Regardless of what the Missouri CON Law requires, the Committee's own rules and policies mandate that when a Certificate of Need is issued the Committee must make written findings and conclusions. See, 13 C.S.R. 60-3.050(7); CON Handbook IX(B).

30. Rules and regulations promulgated by administrative agencies pursuant to a delegation of power from the legislature have the same force and effect of the law. See, *Macalco, Inc. v. Gulf Insurance Co.*, 550 S.W.2d 883 (Mo.App. 1977). Accordingly an agency is required to obey its own promulgated rules, regulations and policies. As explained by the Court in *Crudup v. Missouri State Division of Family Services,* 500 S.W.2d 129, 132 (Mo.App. 1980), "an agency is bound to conform [its] decision to its own interpretation of a promulgated rule given effect as policy...." Accord, *Mississippi Valley Barge Line Co. v. United States,* 252 F.Supp. 163 (E.D.Mo. 1966), *appeals dismissed sub nom, Pittsburgh Towing Co. v. Mississippi Valley Barge Line Co.*, 385 U.S. 32 (1967). See generally, II Cooper, *State Administrative Law,* 705 (1965). Thus the Committee is bound by its own rules, regulations and policies to issue written findings and conclusions to support issuance of a Certificate of Need.*

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* St. Joseph's also argues that the Missouri APA requires the Committee to issue findings and conclusions. To so conclude would require this Court to determine whether the administrative proceedings here constitute a "contested" or "noncontested" case within the meaning of the Missouri APA. Because this Court finds that the Missouri CON Law and the Committee's regulations require findings and conclusions it is unnecessary to resolve the question of whether this is a "contested" or "noncontested" case.

C. The Committee's Failure To Issue Findings And Conclusions Renders Its Approval Of Pacific Care's Certificate Of Need Void.

31. It is the rule in Missouri that a failure to provide written findings and conclusions pursuant to a statutory or regulatory mandate is reversible error voiding the administrative agency's decision. See, e.g., *Stephen & Stephen Properties, Inc. v. State Tax Com'n,* 499 S.W.2d 798, 804-805 (Mo. 1973); *Michler v. Krey Packing Co.,* 253 S.W.2d 137, 142-43 (Mo. 1952) (En Banc); *Sandbothe v. City of Olivette,* 599 S.W.2d 38, 39 (Mo.App. 1980); *Hughes v. Board of Education,* 599 S.W.2d 254, 255-56 (Mo.App. 1980); *Golden Valley Memorial Hospital District v. Missouri State Board of Mediation,* 559 S.W.2d 581, 582-83 (Mo.App. 1977); *Lincoln City Memorial Hospital v. Missouri State Board of Mediation,* 549 S.W.2d 665, 670 (Mo.App. 1977); *Century State Bank v. State Banking Board,* 523 S.W.2d 856, 858-59 (Mo.App. 1975).

32. Similarly, the failure of an agency to follow its own rules requires that the agency's determination be vacated. Thus in *Crudup v. Missouri State Division of Family Services,* 600 S.W.2d 129 (Mo.App. 1980), the Court vacated the Division of Family Services' determination of benefits for an applicant because the agency failed to follow its own rules in processing the applicant's claim. The reason for vacating the agency decision is that when "an agency disregards its own rules, it may be held that its decision rests on unlawful procedure." II Cooper, *State Administrative Law,* 705 (1965).

33. Here the Committee's approval of Pacific Care's application is void for both of the above reasons. It is undisputed that the Committee has failed and refuses to issue findings or conclusions to support its approval of Pacific Care's Certificate of Need. The Committee is required to issue those findings and conclusions based on the Missouri CON Law, and the Committee's own rules. The authorities are clear that the failure to render those findings and conclusions renders the Committee's decision void and of no effect.

D. The Automatic Approval Provision Of The Missouri CON Law Is No Bar To St. Joseph's Claim.

34. Pacific Care argues that §197.330(2) (1982 Cum.Supp.) of the Missouri CON Law provides for automatic approval of its application because the Committee failed to issue a written decision within the time allowed. From that, Pacific Care argues that this action is moot.

35. The automatic approval provision leaves unaffected St. Joseph's right to attack the approval. First, by the express terms of the Missouri CON Law, the automatic approval is subject to attack upon administrative and judicial review. Section 197.330(2) (1982 Cum.Supp.) provides that "[f]ailure by the Committee to issue a written decision on the application... within the time required...*shall constitute approval and final administrative action on the application subject to appeal*...." (Emphasis added.)

36. This appeal expressly allowed by the Missouri CON Law can include an attack on the approval as lacking findings and conclusions. To hold otherwise would violate a cardinal rule of statutory construction that all provisions of a statute be given effect. See authorities cited above at ¶26. If the automatic approval is read to immunize the approval from a requirement for findings and conclusions, that provision of the Missouri CON Law requiring findings and conclusions to support a Certificate of Need is nullified.

37. That result, in addition to rendering ineffective a portion of the Missouri CON Law, is also directly contrary to the federal requirements for program participation and the intent of the Missouri CON Law. The federal law requires findings and conclusions to be mandated in the State's CON Laws for both approvals and denials of Certificates of Need without exception. The purpose is to ensure that only those facilities which are found needed are to be built. The automatic approval would allow projects to be built solely because of a lack of time

to consider need unless a right to review for findings and conclusions is allowed.

38. While the construction urged by Pacific Care is totally inconsistent with the express language, intent, and effect of the Missouri CON Law, an interpretation allowing this appeal is harmonious with that language, intent and effect. The source, and true purpose of this automatic approval section, is found in the federal law. The NHPRDA provides that Certificate of Need applications should generally be ruled upon within ninety days after filing. Under the federal statute, the state CON Law had to provide a mechanism whereby the applicant could take steps judicially or administratively to obtain a decision on its application if the ninety day period expired without a ruling. (*Id.*) The purpose was only to provide applicants with a speedy administrative review process. See, 1979 *U.S. Code Congressional and Administrative News,* 1380.

39. Missouri accommodated this federal requirement with the automatic approval section. The only variation Missouri places on the federal scheme is to cause the automatic approval. That section is obviously intended to place the burden of challenging the approval on the contesting parties so as to further induce timely consideration. As the federal law makes clear this section is not intended to insulate the approval from review. To the contrary, the following scenario is envisioned. Once an automatic approval is issued, a contesting party must challenge the approval in a review proceeding. This allows the reviewing body to take control of the application to ensure all of the Missouri CON Law requirements are met. This could include a remand that a hearing be held followed by a decision supported by findings and conclusions within a set time frame. In that fashion the applicant is given the speedy consideration while at the same time the other goals of the Missouri CON Law, such as the need for findings and conclusions, are preserved. That exact procedure was employed by Judge Drumm in *The Washington University v. Missouri Health Facilities Review*

Committee, St. Louis County Circuit Court No. 481596, Findings of Fact, Conclusions of Law and Judgment filed May 20, 1983. Thus even accepting Pacific Care's assertion that its application has been automatically approved, that does not prevent St. Joseph's from attacking the approval on the grounds it lacks supporting findings and conclusions.

40. Pacific Care's reliance on the automatic approval section depends upon a finding that the Committee failed to issue a written decision within 120 days. Pacific Care bases its argument that the review period begins on the date of receipt of the application, whether or not it is complete, on the decision of the Administrative Hearing Commission in *Charter Medical Corporation v. Missouri Health Facilities Review Committee, et al.,* N. SC-82-4563, dated January 26, 1983.

41. This Court declines to follow the decision in *Charter Medical* and instead adopts the reasoning of Judge Drumm in *The Washington University v. Missouri Health Facilities Review Committee,* St. Louis County Circuit Court No. 481596, Findings of Fact, Conclusions of Law and Judgment filed May 20, 1983.

42. In *Washington University,* Judge Drumm found the intent of the legislature was best met by interpreting the term "file", for purposes of calculating the review time, to mean when a Certificate of Need application is deemed complete. In this way the Committee is guaranteed the statutorily prescribed time to give full consideration to the issues of need. To rule otherwise could result in automatice [sic] approvals simply because an application is so incomplete that the Committee could not act on it.

43. Pacific Care's final argument in this regard is that even if the Committee did decide at the January 31, 1983, hearing within the 120 days, those 120 days have long since passed and there is still no written decision. Thus Pacific Care argues that, even accepting St. Joseph's and the Committee's view, 120 days

has passed since the application has been deemed complete without a written decision. Pacific Care is wrong. It did receive the Committee's decision in writing within the 120 days as calculated from the completeness date. By letter dated February 7, 1983, the Committee, in writing informed Pacific Care that it had approved the application. (A.R. at 413-14.)

44. Of course St. Joseph's contends that the written decision of approval is void because it lacks supporting findings of fact and conclusions of law. Unlike §197.330.1(5), the automatic approval section does not mention an absence of findings and conclusions as triggering automatic approval. *Compare,* Mo.Rev.Stat. §197.330.1(5) ("issue in writing its findings of fact, conclusions of law, *and its approval or denial*..."); *with,* Mo.Rev.Stat. §197.330.2 ("Failure by the committee to issue a *written decision*...shall constitute approval...."). Thus there can be a timely written decision, precluding application of the automatic approval section, which is nevertheless insufficient because of a lack of supporting findings and conlcusions. This is precisely the situation here.

JUDGMENT

It is therefore ORDERED, ADJUDGED AND DECREED that:

1. The Motion of Pacific Care For Summary Judgment is DENIED;

2. The Motion of the Committee for Dismissal/Summary Judgment is DENIED; and

3. The Motion of St. Joseph's for Summary Judgment on Counts I and II of its Petition is GRANTED.

It is FURTHER ORDERED, ADJUDGED AND DECREED that:

1. The Committee's January 31, 1983, approval of Pacific Care's Certificate of Need application to construct and operate

a 120 bed nursing home in Pacific, Missouri is void for lack of written supporting findings of fact and conclusions of law;

2. Pacific Care is enjoined from constructing or operating its proposed 120 bed nursing home in Pacific, Missouri unless and until it obtains a valid Certificate of Need issued by the Committee in accordance with this opinion and judgment;

3. Costs are taxed equally against Defendants Missouri Health Facilities Review Committee and Pacific Care Center, Inc.

ENTER: /s/ Philip Hess, Judge

Dated: July 15, 1983

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STATE OF MISSOURI)
) SS
COUNTY OF JEFFERSON)

I, Eula J. Kidd, Clerk of the Circuit Court, in and for said County, hereby certify the attached and foregoing to be a true copy of the proceedings of our said Circuit Court, on the day and year above written, as the same appears of record in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of said Court, at office in Hillsboro, Missouri, this

15th day of July, 1983.

/s/ Eula J. Kidd
Clerk of the Circuit Court

By: /s/ Pamela Politte
Deputy Clerk

APPENDIX B

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
DIVISION FOUR

No. 47685

St. Joseph's Hill Infirmary, Inc.,
Plaintiff-Respondent,

vs.

Rabbi Herbert J. Mandl, *et al.*,
as members of the
Missouri Health Facilities
Review Committee,
Non-appealing Defendant,

and

Pacific Care Center, Inc.,
Defendant-Appellant.

Appeal from the Circuit Court of
Jefferson County

Hon. Philip G. Hess, Judge

OPINION FILED:

May 22, 1984

Pacific Care Center, Inc. (defendant) appeals from the judgment of the trial court holding void a certificate of need for a nursing home issued to it by the Missouri Health Facilities Review Committee (Committee) acting pursuant to Sec. 197.300 et seq. RSMo 1982 Cum.Supp. The petition upon which the trial court acted was filed by St. Joseph's Hill Infirmary, Inc. (plaintiff). The defendant's nursing home is proposed to be located in Pacific, Missouri. St. Joseph's operates two nursing homes within a 15 mile radius of the Pacific site and would be in competition with the proposed nursing home.

The trial court determined that (1) St. Joseph's had standing to bring this action, (2) the certificate of need was void because the Committee failed to prepare findings of fact and conclusions of law, and (3) the time for review mandated by Sec. 197.330 was complied with and the application was not approved by operation of law under that section. We conclude that the trial court erred in its determination of standing and accordingly reverse. In so doing we do not reach the remaining issues or determine the validity of the certificate of need.

The Missouri Certificate of Need Law (hereinafter CON) was enacted in 1979, in response to the National Health Planning and Development Act, 42 U.S.C.A. 300k et seq. and more specifically Secs. 300 m-6 and 300 n-1. The federal act requires that a designated state agency have the authority under state law to administer an acceptable certificate of need program. The act is not technically mandatory but it does establish an optional program which a state must implement in order to receive federal funds allocated by the act.

> "The essence of the certificate-of-need program is the requirement that any proposed construction of or significant capital expenditure for health facilities in a state be certified to be necessary by the State Agency before it is offered. The program is intended to reduce unnecessary duplication in health care facilities and thereby, it is hoped, reduce the cost of health care to consumers." Greater St. Louis Health Systems Agency v. Teasdale, 506 F.Supp. 23 (E.D. Mo. 1980) [1] l.c. 28.

The Committee is the designated state agency to administer the CON program. Also in the picture are health systems agencies (HSA) which are regional health planning organizations designated directly by the Secretary of Health and Human Services.

With this background we return to the state statute. When a new facility for health care is planned the person proposing to

develop or offer the new institutional health service must submit a letter of intent to the Committee and a "request" to both the HSA and the Committee thirty days prior to filing the application for a certificate of need. Sec. 197.325. The Committee, within very restricted time frames, must process the application when made, cause notice to be given to "affected persons" and contiguous HSA's, hold public hearings if requested by any "affected person," consider recommendations by the appropriate HSA, make written findings of fact and conclusions of law, issue its approval or denial of the application, and serve its findings, conclusions, and decision on the applicant, the HSA and any "affected person" who has requested them. Sec. 197.330. "Affected person" is defined to mean "the person proposing the development of a new health care service, the public to be served, the health systems agency and health care facilities within the service area in which the proposed new health care service is to be developed." Sec. 197.305(1). Failure of the Committee to issue its decision within the time mandated by the statute constitutes approval of the application.[1] Sec. 197.335 provides:

> "Within thirty days of the decision of the committee, the applicant or the health systems agency within whose area the new institutional health service is to be offered may file an appeal in accordance with the provisions of sections 161.252 to 161.342, and Chapter 536, RSMo, provided, that venue of any appeal to the circuit court shall be in the county within which such health care service or facility is proposed to be developed."

The question of the standing of a competitor to appeal from the issuance of a certificate-of-need is one of first impression in

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[1] The question of when the clock begins to run—upon initial filing of the application or when it is deemed to be complete—was determined by the trial court to be the latter. We are not reviewing that finding.

this state. There are, however, cases dealing with other administrative decisions which provide guidance. Plaintiff here is clearly an "affected person" under the statute. As an "affected person" it is entitled to notice and a public hearing on the application for a certificate-of-need. But that status does not in itself give plaintiff standing to appeal the decision of the committee. As stated in State ex rel. Rouveyrol v. Donnelly, 285 S.W.2d 669 (Mo. banc 1956) [15-17] quoting from 73 C.J.S. Public Administrative Bodies and Procedure, § 176, p. 517:

> "Not every person who files a protest and is given an opportunity to be heard by the administrative agency has a right to appeal from an order of the agency, but whether a particular person has the right to contest administrative action is largely a question of law, dependent on a number of variable factors, including the nature and extent of his interest, the character of the administrative act and the terms of the statute."

The terms of the statute before us give the right of appeal solely to the applicant and the HSA for the area where the new service is to be offered. It does not grant such right to all "affected persons" which would include members of the public. It has consistently been recognized that while the public welfare is intended to be the controlling factor in administrative agency decisions, it was not intended that every citizen may participate in any case. If such participation, including rights of appeal, were allowed, it would prevent the agency from functioning efficiently. State ex rel. Rouveyrol, *supra,* [11]; City of Richmond Heights v. Board of Equalization of St. Louis County, 586 S.W.2d 338 (Mo. banc 1979) [5]. The statutory framework of the CON statute provides for an appeal by the applicant, which has a private interest, or by the area HSA, which exists to protect the public interest. We find no express authority under the statute for an appeal by plaintiff.

Plaintiff contends, however, that its right to appeal is guaranteed by Art. V, Sec. 18, Mo. Const. which provides:

> "All final decisions, findings, rules and orders on [sic] any administrative officer or body existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights, shall be subject to direct review by the courts as provided by law; ..."

That constitutional provision has in turn been implemented by Sec. 536.100 RSMo 1978 as follows:

> "Any person who has exhausted all administrative remedies provided by law and who is aggrieved by a final decision in a contested case ... shall be entitled to judicial review thereof ... ."

A party is aggrieved when the judgment operates prejudicially and directly upon his personal or property rights or interests. Such operation must be immediate and not merely a possible remote consequence. The Hertz Corporation v. State Tax Commission, 528 S.W.2d 952 (Mo. banc 1975) [2]. The right or interest involved must be one the law protects. It must also act directly on an interest of the person who claims the right of review in a manner distinct from the effect on the general public. State ex rel. Schneider v. Stewart, 575 S.W.2d 904 (Mo. App. 1978) [16,17]. The definition of "aggrieved" found in these cases serves to define the "private rights" which must be affected to trigger the constitutional provision.

Generally speaking the "right" to be free from legitimate competition is not a right at all and is certainly not one protected by law. State ex rel. Rouveyrol v. Donnelly, *supra,* [1-4]; City of Eureka v. Litz, 658 S.W.2d 519 (Mo. App. 1983) [12]; Herman Glick Realty Co. v. St. Louis County, 545 S.W.2d 320 (Mo. App. 1976) [4]; Schmitt v. City of Hazelwood, 487 S.W.2d 882 (Mo. App. 1972) [13]. We did recognize in City of Eureka v. Litz, *supra,* that a competitor may achieve the status of an "aggrieved person" based upon the legislative policy of the particular statute establishing the administrative review. This recognition was expressed in Bank of Belton v. State Bank-

ing Board, 554 S.W.2d 451 (Mo. App. 1977) and Farmer's Bank of Antonia v. Kostman, 577 S.W.2d 915 (Mo. App. 1979) [1-3]. Those cases arose under the licensing provisions of the banking statutes and because of certain parallels to the statutes now before us and the language of the Belton case, in particular, some review of the banking cases is warranted.

The Supreme Court addressed the standing of a competitor to appeal the granting of a banking license in State ex rel. Rouveyrol v. Donnelly, *supra.* The statutes then in force provided for review pursuant to the statutes pertaining to the Public Service Commission. Those statutes in turn limited those allowed to participate in appellate review to the commission and "each party to the action or proceeding before the commission." Sec. 386.510 RSMo 1949. Sec. 386.420 RSMo 1949 provided for intervention in the Commission proceedings of "such corporations and persons as the commission may allow to intervene." Intervention gives a person the status of a party and must be based upon having such an interest in the outcome that participation in the proceedings is justified. The Supreme Court found that a competitor did not have a sufficient interest in a bank licensing proceeding to qualify as an interested person if the question of standing is determined by the Public Service Commission statutes. The Court then went further and held that the review procedures of Sec. 386.510 determine the kind and manner of review but that the parties entitled to review must be determined by the banking statutes. It found no authority in those statutes to grant a competitor standing to seek judicial review and no authority to allow intervention. In dealing with the provisions of Art. V, §22 Mo. Const., the predecessor to Art. V, § 18 and identical in all parts here pertinent, the Court held that the minimum requirements of that provision were satisfied. The applicants for a license were the persons whose private rights might be affected and the commissioner and subsequently the board of bank appeals represented the general public interest in the exercise of the police power. State ex rel. Rouveyrol v. Donnelly, *supra,* [20]. That case was

followed in State ex rel. Belle-Bland Bank v. Donnelly, 287 S.W.2d 872 (Mo. 1956).

The predecessor of Sec. 536.100 RSMo 1978 was in effect at the time of the *Rouveyrol* decision. Laws 1945, p. 1504 § 10. It provided that a person who was aggrieved by a final decision in a contested case "shall be entitled to judicial review thereof, as provided in this section, unless some other provision for judicial review is provided by statute; ..." The Supreme Court's finding that a competitor was not entitled to appellate review under the banking statutes and the absence of any reference to Sec. 536.100 as conferring any other right of review buttresses the conclusion that the *Rouveyrol* court found no aggrievement to a competitor as such.

State ex rel. Rouveyrol v. Donnelly recognizes two distinct concepts in determining standing in appeals from administrative decisions. The Constitutional right to such an appeal is based upon the fact that the decision affects the "private rights" of the person appealing. If such rights are affected the legislature cannot restrict the right of appeal although it may provide for the method of review. State ex rel. State Highway Commission v. Weinstein, 322 S.W.2d 788 (Mo. banc 1959) [7,8] [16]. The general assembly is free, however, to expand the right of appeal if it chooses to do so. State ex rel. State Highway Commission v. Weinstein, *supra*. [7,8] [17]. If it determines that the public welfare is best served by permitting those interested in the decision to participate albeit no "private rights" of theirs are affected for Constitutional purposes, it may do so. It may through its legislative enactments allow interested persons to become parties, or allow them appeal privileges. If it does so such persons may become "aggrieved" for purposes of that administrative procedure or tribunal. That does not mean that similarly situated persons are "aggrieved" by the action of a different administrative body under a different statute.

The matter considered in State ex rel. Rouveyrol v. Donnelly was subsequently addressed in Bank of Belton v. State Banking

Board, *supra.* In the interim the banking statutes had been amended to provide for intervention by competitor banks (Sec. 361.095 RSMo 1978). The court, however, did not place its decision solely upon the amendment of the banking laws giving competing banks a position equivalent to a party. It also concluded that a competitor is "aggrieved" when the "judgment operates prejudicially and directly—with immediate consequence—upon a personal or property right or interest." [2]. The court then concluded that threatened competition affected such a property right or interest placing the competitor bank within the coverage of Art. V, Sec. 18 (mistakenly referred to as Sec. 22). The court then went on to state:

> "The law favors free competition among banks but within a system of regulation ... That principle is best served by the grant of standing to a competitor adversely affected by new competition authorized by administrative decision." [2].

The court did not analyze the nature of the private right or interest affected by the administrative decision. As we have pointed out heretofore, there is no right to be free of competition nor a private interest in preventing competition. There is no question that regulation of banks, and of medical facilities under the CON statutes, is premised upon maintaining the business in healthy condition by reducing competition and thereby insuring that those providing banking and medical service are strong viable entities able to serve the public more effectively and efficiently at lower cost. The purpose of restricting competition through licensing is to benefit the public generally, not to protect the rights or interests of the regulated companies. As such, competitors may be the beneficiaries of the licensing procedures but those procedures do not directly affect their "private rights." We believe this was recognized in State ex rel. Rouveyrol v. Donnelly, *supra,* in denying constitutional appeal status to competitors in banking cases.

> The concept of banking regulation did not change between that case and the Belton bank case and we find the conclusion of the court in the latter case that competitor banks have constitutional appeal status to be contrary to the *Rouveyrol* decision. We have no quarrel with the *Belton Bank* conclusion that the statutory change regarding intervention evidenced a legislative intention to allow full party privileges to competing banks including appeal rights. By statutory provision competing banks became "aggrieved parties" in banking licensing cases.

Whether the system of regulation is best served by allowing competitors to participate in the administrative procedure is a legislative determination. In the case of banking, that determination has been made in the affirmative. In the case before us, it has been made in the negative. As originally proposed, House Bill No. 222, 80th General Assembly, provided for appeal only by the applicant or the HSA.[2] As perfected in the House, the bill contained amendments made in committee which provided that "any affected person[3] participating as a party in the formal review may appeal the decision to the circuit court ..." The Conference Committee Substitute for House Bill 222 which was enacted and signed by the governor deleted the quoted language and reinstated the language of the original bill, thereby restricting the right of appeal to the applicant and the area HSA. This is strong, persuasive evidence of the legislative

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[2] We are authorized to examine the original bills to determine the legislative intent (State ex rel. Danforth v. European Health Spa, Inc., 611 S.W.2d 259 (Mo. App. 1980) (On motion for rehearing)) or to examine the journals of the general assembly (Bullington v. State, 459 S.W.2d 334 (Mo. 1970) [1]). We have therefore obtained from the Secretary of State certified copies of the printed proposed bills constituting the legislative history of the Certificate of Need law.

[3] The definition of "affected person" describes those persons contained in Sec. 197.305(1) heretofore quoted and would include plaintiff.

intent to restrict the right of appeal. Supportive also of this legislative intention is the rigid time schedule imposed by the statute and the automatic approval provision signifying that final action on the application is to be concluded expeditiously. Only if the action of the Committee is such as to trigger the appellate opposition of the HSA, representing the public interest, is final determination of necessity to be delayed for an appellate review. The competitive considerations in the medical care field and the banking field are similar but not identical. The impact on the individual from the bankruptcy of a medical facility is far different than the impact from a bank failure. A major purpose in reducing or stabilizing competition in the medical facility field is to effect economics of operation resulting in lower health care cost. 42 U.S.C.A. 300K(a). A major purpose in the banking field is to insure solvency of the institutions and resultant security of the assets of customers. There are also differences in the number of potential competitors of an applicant in the two areas and the resultant complication and delay in processing. There is also a difference in the availability of an agency to represent the public interest, particularly in view of the existence of HSA's whose function is exactly that. Finally there are differences between the need for immediacy of determination to approve the license. These are all factors for legislative consideration in determining who should be given appeal status. The nature of the CON law does not mandate a finding that it inherently requires an opportunity for appeal by a competitor.

We conclude therefore that plaintiff has no constitutional right to review under Art. V, Sec. 18 and that it has not been accorded "aggrieved" status under the provisions of the CON legislation.

Plaintiff also points to the federal law and opines that it was the legislative intent to provide in the Missouri law whatever was required by the federal act. We note in passing that the Missouri law differs from the federal act in several respects. *See* Greater St. Louis Health Systems Agency v. Teasdale, *supra*. In

addition the review criteria of the federal act provides as a minimum that review be provided for those "adversely affected by a final decision ..." 42 U.S.C.A. 300 n-1(b)(12)(E). "Adversely affected" is not further defined. Only when the regulations promulgated by the Secretary are reached do we find an expressed federal policy to allow appeal by competitive health providers. 42 C.F.R. 123.410(a)(14) and 123. 401. Even those guidelines are not mandatory upon the states as they are subject to waiver by the Secretary or subsequent amendment. 42 U.S.C.A. 300 n-1(a). We do not feel constrained to conclude that the Missouri statute automatically encompasses whatever may be included in the present or subsequent regulations of the Secretary in the absence of a clear statement that that is the legislative intent. We not only do not find such a statement but the legislative history, heretofore chronicled, establishes the specific rejection of the review suggested in the regulations.

Plaintiff had no standing to appeal the finding of the Committee and the trial court lacked jurisdiction over plaintiff's petition.

Judgment reversed and plaintiff's petition is ordered dismissed.

/s/ Gerald M. Smith, Judge

/s/ Carl R. Gaertner, Presiding Judge Concurs

/s/ Albert J. Stephan, Jr., Judge Concurs

APPENDIX C

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

Division Four

No. 47685

St. Joseph's Hill Infirmary, Inc.,
Plaintiff-Respondent,

vs.

Rabbi Herbert J. Mandl, et al., as members of the
Missouri Health Facilities Review Committee,
Non-appealing Defendant,

and

Pacific Care Center, Inc.,
Defendant-Appellant.

Appeal from the Circuit Court of Jefferson County
Hon. Philip G. Hess, Judge
FILED: July 10, 1984

ON MOTION FOR REHEARING

PER CURIAM

Plaintiff in its motion for rehearing has called to the court's attention the fact that regional health service agencies (HSA's) were abolished by executive order of the Missouri governor in 1982. Their functions were assumed by the State Health Planning and Development Agency (SHPDA). Plaintiff contends this fact, not previously addressed in the briefs, was overlooked by the court in arriving at its decision and that the reliance of the Court upon HSA's to protect the public interest is misplaced.

Our references to HSA's as protectors of the public interest were made in connection with our analysis of the legislative scheme found in the certificate of need law. We concluded that the general assembly elected to provide appeal status from the granting of a certificate of need only to the regional HSA, and elected to deny such status to other persons. Subsequent abolition of the HSA's by executive order in no way changes the legislative enactment which does not grant to plaintiff a right of appeal. Our decision was not premised upon a determination that if HSA's could not appeal plaintiff could. The appeal rights of HSA's were simply a rationale for a legislative determination that no need existed for appeal by persons such as plaintiff. The general public interest is represented by the Committee itself and SHPDA. State ex rel. Ronveyrol v. Donnelly, 285 S.W.2d 669 (Mo. banc 1956). There is no requirement of law of which we are aware that requires appellate review of the Committee grant of a certificate of need except when "private rights" are affected. We have already held that no "private rights" of plaintiff are affected. The absence of HSA's does not warrant or mandate a judicial substitution of competitors for HSA's as a source of appellate review. If such review is advisable the legislature is free to so provide. To date it has not done so.

Motions for rehearing and for transfer to the Supreme Court denied.

APPENDIX D

IN THE SUPREME COURT OF MISSOURI
EN BANC

No. 66201

September Session, 1984

St. Joseph's Hill Infirmary, Inc.,
Plaintiff-Respondent,

vs.

Rabbi Herbert J. Mandl, et al., etc.,
and Pacific Care Center, Inc.,
Defendant-Appellant.

TRANSFER

THE STATE OF MISSOURI to the Judges of the Missouri Court of Appeals, EASTERN District, GREETINGS:

Now at this day, on consideration of the application of plaintiff-respondent, St. Joseph's Hill Infirmary, Inc. to transfer the above entitled cause, No. 47685, from the EASTERN DISTRICT, Missouri Court of Appeals, it is ordered that said application be, and the same is hereby sustained.

Therefore, you, as Judges of the Missouri Court of Appeals, EASTERN DISTRICT, are ordered to send to this Court on or before the 11th day of October, 1984, a full and complete transcript of the record and proceedings in your court, together with copies of all records and briefs filed in your court in the said cause.

It is further ordered that you recall your mandate, if the same has issued, and that you take no further action in this case.

IN TESTIMONY WHEREOF, I have hereunto set my hand and the Seal of said Court at my office in the City of Jefferson, this 11th day of September, 1984.

/s/ Thomas F. Simon
Clerk, Supreme Court of Missouri

APPENDIX E

SUPREME COURT OF MISSOURI
EN BANC

No. 66201

Eastern District No. 47685

January 23, 1985

St. Joseph's Hill Infirmary, Inc.,
Plaintiff-Respondent,

vs.

Rabbi Herbert J. Mandl, et al., etc.,
Defendants,

and

Pacific Care Center, Inc.,
Defendant-Appellant.

ORDER

Cause ordered retransfered to the Missouri Court of Appeals, Eastern District.

Day - to - Day

Albert J. Rendlen, Chief Judge

STATE OF MISSOURI—SCT.:

I, THOMAS F. SIMON, Clerk of the Supreme Court of Missouri, do hereby certify that the foregoing is a true copy of the order of said court, entered on the 23rd day of January, 1985, as fully as the same appears of record in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court.

Done at office in the City of Jefferson, State aforesaid, this 23rd day of January, 1985.

/s/ Thomas F. Simon, Clerk
by /s/ Mary Elizabeth McHaney, D.C.

APPENDIX F

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

No. 47685

St. Joseph's Hill Infirmary, Inc.,
Respondent,

vs.

Rabbi Herbert J. Mandl, et al., as members of the
Missouri Health Facilities Review Committee,
Non-appealing Defendant,

and

Pacific Care Center, Inc.,
Appellant.

ORDER

WHEREAS, on May 22, 1984, the judgment of the trial court was reversed by the Missouri Court of Appeals, Eastern District; and

WHEREAS, on September 11, 1984, the cause was transferred to the Missouri Supreme Court by its order; and

WHEREAS, on January 23, 1985, the Missouri Supreme Court retransferred the cause to the Missouri Court of Appeals, Eastern District;

NOW, therefore the Court, being sufficiently advised, adjudges that the judgment rendered herein by the Circuit Court of Jefferson County in its cause No. 1836432 be reversed in accordance with the opinion of this Court herein delivered May 22, 1984. Opinion by Gerald M. Smith, Judge and concurred in by Carl R. Gaertner, Presiding Judge, and Albert J. Stephan, Judge. The motion of St. Joseph's Hill Infirmary, Inc. to stay mandate is taken under submission.

STATE OF MISSOURI)
) SS.
CITY OF ST. LOUIS)

I, LYNN HEARNES, Acting Clerk of the Missouri Court of Appeals, Eastern District, certify that the foregoing is a true copy of the opinion/order delivered by this court in the foregoing entitled cause on the 29th day of January, 1985, as fully as the same appears on file in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at office, in the City of St. Louis this 29th day of January, 1985.

/s/ Lynn C. Hearnes
Clerk, Missouri Court of Appeals
Eastern District

APPENDIX G

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

** TO: ATTORNEYS OF RECORD
RE: MANDATES MAILED — CASES CLOSED
DATE: MARCH 11, 1985

47685 St. Joseph's Hills Infirmary, Resp. vs. Pacific Care Center, Inc., App.

** ATTORNEYS OF RECORD: Please note that any exhibits currently filed on the above-styled cases may now be removed by the filing attorney. *Further note* that in regard to *Civil cases only,* that you must respond within thirty (30) days from the date of this list or the exhibits will be disposed of in accordance with Supreme Court Rule No. 81.15.

Please contact Mr. James W. Fernandez, Marshall, at 444-6959 to collect your exhibits, or come to the Court of Appeals, Wainwright State Office Bldg., 111 N. 7th St., Room 350.

APPENDIX H

STATE OF MISSOURI)
) SS
COUNTY OF JEFFERSON)

IN THE CIRCUIT COURT OF THE TWENTY-THIRD JUDICIAL CIRCUIT OF MISSOURI, AT HILLSBORO, JEFFERSON COUNTY, MISSOURI

Cause No. CV183-643-CC-J2

St. Joseph's Hill Infirmary, Inc.,
Plaintiff,

vs.

Missouri Health Facility Review Committee,

and

Pacific Care Center, Inc.,
Defendants.

JUDGMENT AND ORDER

Comes now the Circuit Court of Jefferson County and, having received the Mandate of the Missouri Court of Appeals, Eastern District, dated March 11, 1985, dismisses Plaintiff St. Joseph's Hill Infirmary, Inc.'s Petition in accordance with the opinion of the Missouri Court of Appeals, Eastern District, dated May 22, 1984 in the above-styled cause. All costs in this cause, including costs of the Appeal in the amount of $50.00, are taxed against Plaintiff St. Joseph's Hill Infirmary, Inc.

SO ORDERED:

/s/ Philip G. Hess, Judge

STATE OF MISSOURI)
) SS
COUNTY OF JEFFERSON)

I, Eula J. Kidd, Clerk of the Circuit Court, in and for said County, hereby certify the attached and foregoing to be a true copy of the original of the proceedings of our said Circuit Court, on the day and year above written, as the same appears of record in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of said Court, at my office in Hillsboro, Missouri, this
5th day of April, 1985.

/s/ Eula J. Kidd
Clerk, Circuit Court

By: /s/ Tina Bone
Deputy Clerk

APPENDIX I

MISSOURI DEPARTMENT OF SOCIAL SERVICES
STATE HEALTH PLANNING AND
DEVELOPMENT AGENCY
Broadway State Office Building
P. O. Box 88
Jefferson City, Missouri
65103

MEMORANDUM

TO: Members of the Missouri Health Facilities Review Committee

FROM: Rick Hutcherson
Health Planning Specialist

DATE: January 21, 1983

SUBJECT: **Application Summary and SHPDA Findings**

I. **Applicant's Name:** Pacific Care Center, Inc.
218 South First
Pacific, Missouri 63069
Representative: Joseph Dailey of Pacific, Missouri
SL 1890782-613 N

II. **Proposed Expenditure:** $2,995,354 (100% Financed through IRB's)

III. **Project Description:** This application details a proposal to construct a 120-bed medicaid ICF/SNF at Pacific, Missouri. The project would be 100% debt financed through tax exempt industrial development bonds.

IV. **Decision Deadline:** February 12, 1983

V. **Relationship With Other Projects Or Plans:** This project would expand the LTC bed capacity in the area of a 15-mile radius around Pacific by 120 beds, or 10.2%. It does not conflict with any plans or projects which have been submitted to SHPDA. However, it would affect Price Memorial Nursing Home, located in Eureka. Price Memorial is a new 120-bed non-medicaid facility first licensed in September, 1981. After 16 months of operation the facility has only 28% of its beds filled.

VI. **SHPDA Findings:** This project was evaluated relative to the projected need for LTC beds arrived at by the application of the LTC bed need methodology of the of the **State Health Plan** (SHP), the utilization of LTC beds within the area, the participation in the use of beds by public assistance recipients, the availability of alternative services, etc.

The 1980 population count for the area contained in a 15-mile radius of Pacific used in the analysis was found by examining the 1980 population counts done in townships, census tracts, enumeration districts, census blocks, census places, etc. (In some instances, counting was done household by household.) The total 1980 population of the area was concluded to be 181,378. This information was then analyzed relative to different rates of growth of various age cohorts, the in- and out- migration of population in the area by total population and by age cohort, etc. The result was a population projection for the area in 1985 totalling approximately 172,511 people under 65 and 21,710 people 65-and-over. Applying this data to the LTC bed need methodology of the *SHP*, a total LTC bed need for the area by 1985 was projected to the 1,102 beds. There are now 1,177 LTC beds in the area. Therefore, an excess of 75 beds is projected to exist in the area by 1985.

The applicant counted a total of 1,979 beds (15 facilities) as being applicable to his determination of need for beds. The utilization of the beds in the 15 facilities counted by the applicant was given as 98.2%. Investigating the location of facilities in the area, the number of licensed and certified beds, their utilization and other concerns, major differences were found between the applicant's data and that which was available in documentation.

The actual number of LTC beds in the 15-mile radius was 1,177 (10 facilities). The number of medicaid certified beds was 344 in December, 1982. The annual occupancy of the total number of licensed beds in these 10 facilities in 1982 was approximately 82%. The occupancy of the medicaid beds in December, 1982 was 77%. The conclusion of this is that a substantially different situation exists in this area relative to availablity and composition of LTC services than indicated in the application.

The total number of recipients receiving either medicaid or state nursing care assistance in LTC facilities in the counties of Franklin, Jefferson, St. Charles & St. Louis declined 10.2% (1,599 recipients) during the period. The number of recipients which were on the medicaid program grew 5.9% during the period which the number of nursing care assistance dropped 25.6%. This would suggest some possible movement of residents from one program to another, but that the net number of the combination of both recipient types is declining. Not withstanding a dramatic growth in the number of self-pay residents in these facilities, it appears that the utilization of facilities in this area by recipients of state assistance programs has not been expanding during the past year. With the occupancy rates of the area facilities considered, an expansion of capacity would seem to be unnecessary, and, in fact, may result in adverse effects to the existing market place (see summary of public hearing-Attachment 1).

Turning to the financial feasibility of the project, which is not separable from the effects of low occupancy, the applicant has estimated the total project cost to be $2,995,354. New construction square footage will total 32,626 at a unit cost of $51.82. The entire project cost will be financed by tax exempt industrial development bonds. Underwriters have projected bond interest to be 15% per annum for 30 years. Construction is to be completed June 1, 1983.

Utilization is projected as 85% in year 1, 95% in year 2 and 98% in year 3. Per diems which were projected at $36.00 for ICF and $38.00 for SNF, although reasonable today, may be affected by the new reimbursement regulations of the medicaid program.

This analysis has considered the existing facilities and beds within a 15-mile radius of Pacific, Missouri. It has also investigated utilization trends in the abstract as well as those by specific recipient groups. This has been done by contrasting performance over time as well as within the context that the marketplace is in flux by virtue of the statutory, regulatory and program changes which affect LTC facilities and their utilization. This analysis concludes that additional beds would be unnecessary, duplicative and potentially harmful to the functioning of other providers within the marketplace. Therefore, it is recommended that this project not be granted a Certificate of Need.

PACIFIC CARE CENTER, INC.
PACIFIC, MISSOURI
SL 1890782-613 N

Criterion 1: The need for the services by the population served.

The basis of need for this project as developed by the applicant, centered on a need-based formula similar to that found in the *State Health Plan.* This formula requires inputs of population and existing bed capacity to determine the extent to which additional LTC beds may or may not be needed.

The applicant supplied the two inputs of population and bed capacity. The planning horizon for which population projections was needed was 1985. The applicant projected the population of a 15-mile radius around Pacific to be 416,928 by 1985. This number was arrived at by multiplying the percent of the area of a county that was in the 15-mile radius by the total population of a county as listed during the 1980 census. This number was then inflated to the degree that population growth was expected by 1985. This method of population estimation used to arrive at the number of people that were in the 15-mile radius in 1980 assumes the population is equally distributed within each county.

The need for this project was reviewed using the LTC bed need methodology prescribed in the Missouri *SHP.* Discussion and consideration was given to various other factors; among them fluctuation in the utilization of area LTC facilities by various recipient types, the number and location of beds which only accomodate medicaid or only nursing care assistance patients, the reimbursement environment affecting LTC facilities in the state and the availability of alternative services within the area.

The proposed service area of the applicant is a 15-mile radius around Pacific, Missouri. Pacific is located west of St. Louis County on Highway 44 in Franklin County. A 15-mile radius

centered at Pacific includes parts of Franklin, St. Charles, St. Louis and Jefferson Counties. It also contains a very small part of the southeastern tip of Warren County. Figure 1, shown below, illustrates the area within the 15-mile radius.

IGURE 1: AREA WITHIN A 15-MILE RADIUS OF PACIFIC, MISSOURI

The four counties considered in this population analysis differ nsiderably. Table 1 provides the population of each county and its owth since 1970.

BLE 1: POPULATION AND GROWTH OF SELECT COUNTIES

unty	1980 Population			% Growth 1970-1980		
	< 65	65+	Total	< 65	65+	Total
anklin	62,909	8,324	71,233	29.0	31.1	29.2
fferson	135,535	10,648	146,183	37.8	54.4	38.9
. Charles	135,423	8,684	144,107	54.7	61.2	55.0
. Louis	871,501	102,395	973,896	-0.8	10.8	2.3
	1,205,368	130,051	1,335,419	8.3%	41.4%	10.8%

It may be inferred from this data that the trend was for the area on the outer perimeter of St. Louis County to grow faster in population between '70 and '80 than St. Louis County itself. Further, the growth of the 65-and-over population exceeded that of less-than-65 population in all four counties.

There are also some distinctive patterns occurring relative to the extent to which the population of various age cohorts in each county is growing proportionately to the growth of those same age cohorts for all the counties. For instance, the cohort 65+ in St. Louis County contributed proportionately less people to the four-county area in 1980 than in 1970. In Franklin County the situation was similar. However, Jefferson and St. Charles Counties increased in their rates of growth in that population cohort.

Table 2 depicts percentage data regarding the changing contribution of the cohorts less-than-65 and 65-and-over for each county in the radius.

TABLE 2: COHORT CONTRIBUTION WITHIN COUNTIES IN 15-MILE RADIUS

%Change in Size of Population Cohort, 1970 to 1980

County	65	65+
Franklin	−0.5	+0.5
Jefferson	−0.7	+0.7
St. Charles	−0.2	+0.2
St. Louis	−2.8	+2.8

This data suggests that the population of St. Louis County entered the 65+ age cohort at a faster rate than within any of the other three counties. While this seems to be in conflict with previous statements, it isn't, due to the fact of very slow population growth in general, for St. Louis County while the other three counties were growing rapidly, particularly within the younger age cohorts.

Conclusions which may be drawn from this data included the following:

1. St. Louis County may be growing slowly in total population but its population is entering the 65-and-over cohort in large numbers and very quickly. This is substantiated by looking at the average age of each county's population. In 1980 the average age of the St. Louis County population was 31, with females being 33. The other counties had total averages of 29 and less. Franklin County had a female average of 30 while Franklin and Jefferson Counties has an average of 28.

2. Franklin County, while growing substantially between 1970 and 1980, is yet largely non-urbanized. It had proportionately fewer persons 65-and-over in 1980 than either St. Charles or Jefferson County. Its population 65-and-over is, however, growing faster than its less-than-65 cohort.

3. Jefferson and St. Charles Counties grew very rapidly between 1970 and 1980. They both have very similar sized populations, but Jefferson County had several thousand more persons 65-and-over than St. Charles County, although the median ages of the populations in 1980 were the same.

Having described the growth and age of the population within the four-counties, it is also necessary to consider the size of the population within the service area, which is defined by the applicant as area within the 15-mile radius around Pacific.

The circle of the 15-mile radius is not consistent with the boundaries of any census geography, therefore, it was necessary to estimate the population which was in the service area by analyzing the population by the most specific census geography available. This involved counting population by township, cen-

sus tract, enumeration districts and sub parts of these districts, census places, census blocks, etc. In certain areas, house-by-house counts were made from the documentation available from the 1980 census. The population totals, aggregated to the county level, were then each multiplied by one-half the 1970-to-1980 growth rate for the cohort either less-than-65 or 65-and-over. Table 3 lists the results of this analysis.

TABLE 3: POPULATION OF AREA WITHIN 15-MILE RADIUS

County	Age Cohort	1980 Population	½ '70-To-'80 Rate	1985 Population Projection
Franklin	<65	20,262	14.5	23,200
	65+	2,763	15.55	3,193
Jefferson	<65	39,266	18.8	46,648
	65+	3,253	27.2	4,139
St. Charles	<65	3,103	27.35	3,952
	65+	202	30.6	264
St. Louis County	<65	99,138	-0.4	98,741
	65+	13,391	5.4	11,114
				194,251

The LTC bed need methodology of the State Health Plan was then applied. Table 4 shows the calculation.

TABLE 4: LTC BEDS NEEDED BY 1985 IN 15-MILE RADIUS

Population	X	Criteria 1/	=	Total Beds Needed
172,541		1.1/1000	=	189.8
21,710		42/1000	=	911.8
				1,102 Beds Needed.

1/ All counties are SMSA counties.

The service area contains a variety of LTC beds. The number of facilities and beds which actually exist and are listed in Table 5 does not agree with data found in the application. Table 5 indicates the number of medicaid beds and the occupancy rates of all beds.

TABLE 5: Selected Data on LTC Facilities in 15-Mile Radius

County	Facility & Location	Licensed Beds	Occupancy 1980	1981	1982	12/82 Medicaid Beds	12/82 Occup.	12/82 DMH Placements
Franklin	Sunset (Union)	165	97%	96%	89%	91	98%	47
	St. John's Hosp. (Washington)	20	-	-	-	20	0	0
Jefferson	St. Joseph's (Eureka)	130	97%	94%	85%	0	-	0
St. Louis	Cedarcroft (Valley Park)	176	99%	96%	94%	15	40%	11
	Clayton-Green (Ballwin)	120	86%	90%	85%	32	28%	0
	Marymount (Eureka)	120	-	55%	99%	96	88%	15
	Price Memorial (Eureka)	120	-	-	28.3%	0	-	0
	Valley Park (Valley Park)	76	100%	88%	-	0	-	47
	Westwinds (Ellisville)	120	-	68%	80%	30	93%	15
	Manchester	130	89%	90%	88%	60	83%	0
		1177				344		

Average Occupancy in 1982 = 82%
Average Occupancy for Medicaid Beds During 12/82 = 77%

Sources: Missouri Division of Aging, Center for Health Statistics, Missouri Division of Family Services, Missouri Department of Mental Health, Telephone calls to Facilities.

The data in Table 5 indicates that substantial LTC capacity was vacant in 1982. In fact, the trend clearly is one of declining utilization for at least six of the eight facilities with historical data. This apparent trend was further evaluated relative to the number of recipients (Medicaid or Nursing Care Assistance) who actually received LTC services in any of the four counties from July thru October, 1981 and for the same period in 1982. The comparison indicated that the number of recipients dropped 10.2% between the two periods. The greatest declines were in St. Charles and Jefferson Counties (16.4% and 15.8%, respectively).

The utilization trend by such recipients was different between recipient types, i.e., medicaid versus nursing care. Medicaid is funded by a 60/40 federal-to-state revenue match formula while nursing care is 100% general revenue after inputs of social security and pension benefits. Figures show that the number of nursing care recipients decreased 25.6% during the period while medicaid recipients grew 5.9%. The increasing demand for medicaid beds can be accommodated within the available beds. Several non-medicaid operators spoken with indicated intentions to become medicaid vendors in order to keep some of their existing patients and to attract others. This behavior on the part of operators would probably have the effect of decreasing the overall utilization of beds which were medicaid certified.

The table also shows that 135 or 11.5% of the available beds are filled with Department of Mental Health placements.

Concerning the dispersion of beds by county, it is clear that the majority of LTC beds are indeed to the northeast of the service area which is consistent with the location of the major portion of the population. It is, as well, in this area that the population of persons 65-and-over is increasing most rapidly.

Finally, the total LTC bed count in the service area is 1,177. This should be considered alongside the projection that 1,102 LTC beds will be needed by 1985. This indicates that by 1985 a surplus of over 70 LTC beds would exist. The effects of the present glut of LTC beds is evident in the relatively low occupancy of existing beds.

The proposed facility will have annual debt service payments of approximately $440,000. If it has the same occupancy as the average facility did in 1982 (82%), each resident would pay $2.25 each day for capital costs alone, more than would be necessary if the facility were full. This equates to each resident paying more than $800 each year for bed capacity which remains empty. Indeed, over $80,000 worth of the facility's debt service will be added onto the bills of patients each year to pay for empty beds.

Criterion 2: The relationship of the service proposed to be provided to existing health care system of the area in which such services are proposed to be provided.

This information is contained within the discussion under Criterion 1.

Criterion 3: No consideration shall be given to the facilities or equipment of any other health care facility located more than a fifteen mile radius from the site or proposed site of the applying facility.

The facilities and population considered when projecting a net excess of 70 LTC beds by 1985 were contained solely within a 15-mile radius of Pacific, Missouri.

Criterion 4: Special needs and circumstances of those entities which provide a substantial portion of their services or resources, or both, to individuals not residing in the health service area in which the entities are located or in adjacent health service areas. Such entities may include medical and other health professions schools, multidisciplinary clinics and specialty centers.

Criterion 4 is not applicable to the proposed project.

Criterion 5: The availability based on the demonstrated need, of both medical and osteopathic facilities and services.

Criterion 5 is not applicable to the proposed project.

Criterion 6: The special needs and circumstances of Health Maintenance Organizations and the availability and cost of obtaining the proposed new institutional health service from the existing providers

in the area that are not health maintenance organizations.

Criterion 6 is not applicable to the proposed project.

Criterion 7: The special needs and circumstances of biomedical and behavioral research projects which are designed to meet a national need and for which local conditions offer special advantages.

Criterion 7 is not applicable to the proposed project.

Criterion 8: The relationship of the health services being reviewed to the Missouri State Health Plan.

By inserting the most recent data in the LTC bed need formula of the *State Health Plan,* the proposal was found to be inconsistent with the need as indicated by the *State Health Plan.*

Criterion 9: The relationship of services reviewed to the long-range development plan (if any) of the person providing or proposing such services.

The applicant has no long-range plan.

Criterion 10: The relationship, including the organizational relationship, of the health services proposed to be provided to ancillary or support services.

Ancillary and support services are intended to be provided on an in-house or contractual basis, as appropriate. A letter from St. Joseph's Hospital which was part of the application and indicated various therapies would be made available by St. Joseph's. The administration of St. Joseph's indicated that they were not aware of having agreed to this.

Criterion 11: The immediate and long-term financial feasibility of the proposal, as well as the probable

economic impact upon patients of the costs of and the charges for providing the new health institutional services.

The proposed 120-bed structure will be located on a 4.8 acre plot in Pacific and will cost an estimated $2,995,354 to construct. There will be a total of 32,626 square feet at a cost of $51.82 per foot.

The project will be financed totally by industrial revenue bonds (IRB's). Underwriter's have agreed to issue bonds at 15% per annum for 30 years.

The applicant projects ICF per diems to be approximately $36 and SNF per diems as $38. Occupancy rates were projected to be 85% in year 1, 95% in year 2 and 98% in year 3. All of these occupancy rates exceed the current average occupancy of the existing facilities in the area. Sixty-eight percent of the beds of the new facility are to be filled with medicaid residents.

The applicant has projected revenue to exceed expenses for each of the first three years of operation. This will be possible only by the facility achieving the projected occupancy rates and per diems while containing costs. The most questionable assumption here concerns the projected occupancy rates. These levels of utilization are not typical of the majority of faciilities in the area and they become even less typical of facilities to the west of the Pacific area. This is compounded by the apparent decline in the utilization of LTC facilities by residents who received medicaid or nursing care assistance. A major portion of the resident population of the proposed facility is anticipated to be medicaid supported. The difficulty of LTC facilities to secure residents is further aggrevated [sic] by increasingly restrictive medical and financial eligibility criteria, prorated reimbursement to facilities, the attempt to expand the availability of alternative services in the area thus delaying or eliminating some of the need for LTC services, etc.

Criterion 12: In the case of a construction project:

A. The costs and methods of the proposed construction, including the costs and methods of energy provisions; and

B. The probable impact of the construction project reviewed on the costs of providing health services by the persons proposing such construction projects.

A. The cost of the proposed facility and construction methods and materials are reasonable relative to these considerations as seen in other similar proposals.

B. The applicant is not presently a health care provider. The proposed per diems are reasonable given the costs of construction and operation.

Criterion 13: The availability of resources (including health manpower, management personnel, and funds for capital and operating needs) for the services proposed to be provided, and the availability of alternative uses of such resources for the provision of other health services.

The financing required for the project (IRB's) has been approved by the Pacific Industrial Development Authority. An investment banking firm has agreed to underwrite the bond sale assuming an acceptable report is given by a feasibility study.

Criterion 14: The availability of less costly or more effective alternative methods of providing such services.

This criterion is viewed in light of the previous discussion regarding the apparent lack to [sic] need to expand the LTC bed capacity of the service area. A suggested alternative is the expansion of alternative services which might delay or alleviate the need for some persons to enter a LTC facility.

ATTACHMENT 1

A public hearing on this application was held in Pacific, Missouri, on January 6, 1983. It was chaired by Mr. Hirschl of the Missouri Health Facilities Review Committee. Approximately 100 persons were in attendance.

Mr. Dailey, the applicant, presented testimony of a general nature regarding the need for this facility in the Pacific community. Other speakers in favor of the proposal included the President of the Pacific Chamber of Commerce, the City Administrator, etc. The general thrust of the statements by supporters was that the town of Pacific needed such a facility to accommodate local residents, that substantial local support existed and that it has been a problem to locate LTC for various senior citizens of Pacific.

Speaking in opposition to the proposal were various area LTC operators; namely, St. Joseph's Hill Infirmary, Price Memorial, Marymount Manor, etc. Considerable testimony was presented which noted purportedly erroneous data about area population, LTC facilities in the 15-mile area, occupancy rates, etc. which appeared in the application.

Various other speakers which were not affected parties or community residents commented on the lack of availability of medicaid LTC monies, new proposed reimbursement regulations which will affect LTC facilities, increasing availability of alternative services, etc.

A public record was made of this hearing and has been included in documentation forwarded to the Missouri Health Facilities Review Committee.

APPENDIX J

IN THE SUPREME COURT
STATE OF MISSOURI

No. 66201

St. Joseph Hill Infirmary, Inc.,
Plaintiff-Respondent,

v.

Rabbi Herbert J. Mandl, *et al.*, as members of the Missouri Health Facilities Review Committee,
Non-appealing Defendant,

and

Pacific Care Center, Inc.,
Defendant-Appellant.

APPLICATION FOR TRANSFER AND INCORPORATED SUGGESTIONS IN SUPPORT

Now comes Plaintiff-Respondent St. Joseph Hill Infirmary ("St. Joseph") and hereby applies to this Court, pursuant to Supreme Court Rules 83.02-.04, for transfer. As grounds for its Application, St. Joseph states as follows:

INTRODUCTION

St. Joseph brought this action seeking review of an admittedly void decision of the Missouri Health Facilities Review Committee ("Committee") to issue Pacific Care Center, Inc. ("Pacific Care") a certificate of need to build a new nursing home. The Committee's own administrative arm found that the nursing home should not be approved and that if it was approved it would injure other area providers, such as St. Joseph, by diluting patient utilization. The Circuit Court found for St. Joseph, voided the certificate and enjoined Pacific Care from

building the nursing home. A panel of the Court of Appeals reversed on the ground that St. Joseph had no "private right" to be free of the competitive injury that approval of Pacific Care's nursing home would cause. As shown below this Court should grant transfer because the panel decision is contrary to the decided case law of Missouri, results in a constitutional incompatibility between state and federal law, and involves questions of statewide importance for standing in general and the administration of the Missouri Certificate of Need Law in particular.

I. The Panel Opinion Conflicts With Decisions Finding Injury To Competitive Interests Sufficient To Confer Standing Under Statutory Schemes Regulating Competition.

This Court should grant transfer because the panel decision is directly contrary to established precedent in both the Western and Eastern Districts. In rejecting the theory that a bank's competitive interest, like that of an institutional health care provider, is sufficient to confer standing under the Missouri Constitution Article V, Section 18, the panel's opinion is in conflict, and contrary to, the following decisions:

(A) *Bank of Belton v. State Banking Board,* 554 S.W.2d 451 (Mo.App. 1977)(W.Dist.). The Court in *Bank of Belton* held that, under a system of regulated competition, the Missouri Constitution accords competitors standing:

> There can be little question that a bank is aggrieved by a decision to allow a competitor facility within the same trade area . . . . The economic interest Belton Bank seeks to protect against the administrative order which allows UMB a facility in competition falls within the zone of interests protected by Article 5, §22 [now §18] of the Missouri Constitution as defined in §536.100. (554. [sic] S.W.2d at 453.)

The panel expressly rejected that holding of the Western District. (Slip Op. at 7-8.); and

(B) *Bank of Crestwood v. State Banking Board,* 554 S.W.2d 519 (Mo.App. 1977)(E.Dist. per Weier, J. with Kelly, J. and Gunn, J. concurring). In *Bank of Crestwood,* the Eastern District held that a competitor bank had standing to challenge an administrative decision to certify a competing bank facility. The decision in *Bank of Crestwood* was handed down four weeks after *Bank of Belton* was decided. The Eastern District panel expressly followed the holding in *Bank of Belton* because the Western District opinion "is well reasoned, based on sound principles and precedent, and rules this appeal." (554 S.W.2d at 522). The panel's rejection of *Bank of Belton* is directly contrary to the decision of another panel of the Eastern District; and

(C) *Farmer's Bank of Antonia v. Kostman,* 577 S.W.2d 915 (Mo.App. 1979). In *Farmer's Bank* the Court found competitive interests sufficient to confer standing on one bank to challenge the Director of Finance's decision, pursuant to Mo.Rev.Stat. §362.108 (1978), to allow another bank to establish a branch. Importantly, however, the legislative provision at issue in *Farmer's Bank* did not allow competitor banks to intervene in the Director of Finance's decision to allow branching under Section 362.108, nor was there any provision for judicial review of a decision under Section 362.108 even though other administrative decisions pertaining to bank branching were made expressly subject to review. Nevertheless, the Court in *Farmer's Bank* held that a competitor bank's economic interests gave rise to standing rights under Article V, Section 18 of Missouri's Constitution. The omission of the statutory provisions for intervention are significant under the panel's opinion because the statutory right to intervene is perceived by the panel to be the fact distinguishing standing rights under the banking laws and the Missouri Certificate of Need Law. Yet *Farmer's Bank* recognizes constitutional standing rights in the face of a statutory provision containing no intervention or appeal rights for competitors. The panel's opinion is, therefore, directly contrary to the holding in *Farmer's Bank.*

Transfer is warranted to resolve the conflict between the panel's opinion and the line of authorities given above.

II. The Panel's Opinion That The Existence Of A Public Purpose To A Regulatory Scheme Precludes The Existence Of Private Rights Is Contrary To The Decided Case Law Of Missouri.

The panel recognized that the purpose of the Missouri Certificate of Need Law is to restrict competition. Then the panel concluded that such a purpose failed to give competitors an interest sufficient to create "private rights," because:

> "[t]he purpose of restricting competition through licensing is to benefit the public generally, not to protect the rights or interests of the regulated companies. As such, competitors may be the beneficiaries of the licensing procedures but those procedures do not directly affect their 'private rights'." (Slip Op. at 7.)

That holding is directly contrary to *Farmer's Bank of Antonia v. Kostman,* 577 S.W.2d 915, 921 (Mo.App. 1977), where the Court held that although the banking laws restricted competition to protect the public interest, that statutory policy also gave rise to private rights in existing competitor banks to resist competition. Thus the panel stated that:

> As a prelude, we iterate that the *law accords status to a competitor bank for judicial review* of an administrative grant of charter or facility to another bank within the trade area, not to protect monopoly, but *to keep the system of banks within an equipoise of competition and regulation and so secure the public against the economic havoc of bank failure.* (577 S.W.2d at 921, emphasis added.)

The panel's opinion fails to mention or discuss this conflict with the decision in *Farmer's Bank,* and accordingly this cause should be transferred to resolve this conflict.

Moreover the reasoning that a public purpose precludes private rights is flawed. All legislative and administrative action must, ultimately, be for the public good. See, *Day-Brite Lighting v. Missouri,* 342 U.S. 421, 423-25 (1952). With the Missouri Constitution's prohibition of special legislation, administrative action taken pursuant to statutes that regulate competition can only be sustainable if taken to promote the public interest as opposed to a private interest. See, *Annbar Associates v. West Side Redevelopment Corp.,* 397 S.W.2d 635, 646-47 (Mo. 1965) (En Banc). Notwithstanding the overriding public purpose to all regulatory schemes even the panel recognized that "a competitor may achieve the status of an 'aggrieved person' based on the legislative policy of the particular statute establishing the administrative review." (Slip Op. at 5 citing *City of Eureka v. Litz,* 658 S.W.2d 519 (Mo.App. 1983).) Yet under the panel's reasoning it is impossible for that to occur because every statutory scheme must be created to serve some public interests. Thus no private rights can exist under the panel's formulation of the standing inquiry, even though standing to vindicate and promote a public purpose has been specifically recognized in taxpayer suits. See, *Missourians for Separation of Church and State v. Robertson,* 592 S.W.2d 825, 837-39 (Mo.App. 1979). Hence this matter should be transferred because of the general importance of this proposition and its conflict with the *Farmer's Bank* and *City of Eureka* decisions.

III. Transfer Should Be Granted To Reexamine This Court's Decision In *State Ex Rel Donnelly v. Rouveyrol,* 285 S.W.2d 669 (Mo.Banc 1956) Given The Panel's Interpretation.

The Court should grant transfer because the panel's decision is predicated upon an erroneous reading of *State ex rel Donnelly v. Rouveyrol,* 285 S.W.2d 669 (Mo. Banc 1956). The panel read *Donnelly* as holding that competitor banks lacked standing to challenge decisions granting new bank incorporations in the absence of a statutory right to seek such review. (Slip Op. at 5.)

The Court in Donnelly never considered the status of a competitor. The Court only held that a person denominated only as a "protestant" lacks standing. Thus, as the *Donnelly* Court plainly stated:

> This application . . . recites "Comes also University Bank, the Protestant herein, a corporation interested in the order of Board of Appeals." It does not appear that the courts of Missouri have had occasion to judicially define the term "Protestant" as used herein; however, in Webster's New International Dictionary, 2nd Ed., this definition appears: "3. One who makes or enters a protest; as the *protestants* against proposed legislation." This definition is consistent with the capacity in which the University Bank appeared before the board of bank appeals. (285 S.W.2d at 676).

The reason for the Court's focus in *Donnelly* on the standing rights of "protestants" is understandable when placed in the proper historical context. At the time, the banking laws incorporated the review procedure of the Missouri Public Service Commission Act. That statute allowed any "interested person" to intervene in the agency proceedings and gave any party to those agency proceedings the right to seek judicial review. The interest necessary to qualify as an "interested person" was broadly construed to include a person who was nothing more than a partisan. See, *State ex rel Consumers Public Service Co. v. Public Service Commission,* 180 S.W.2d 40, 47 (Mo. 1944) (En Banc). Believing its standing rights to be defined under the broad provisions of the Public Service Commission Act, the challenging bank in *Donnelly* asserted a right to review on the grounds it was a protestant.

Hence, the panel's reading of *Donnelly* is incorrect for it equates "protestant" in the context of a banking case with "competitor" in the context of this case. The *Donnelly* opinion never even mentions, much less analyzes, competitive interest. Consequently *Donnelly* failed to address the proposition for which it is cited by the panel.

Even if the *Donnelly* opinion did address standing rights of competitors in a regulated environment, that decision should be reexamined. The United States Supreme Court in *Association of Data Processing Service Organizations, Inc. v. Camp,* 397 U.S. 150 (1970), recognized that when entry into business is regulated by an administrative agency, the competitive interests are sufficient to confer standing. In all the states which have considered analagous standing questions, the *Camp* decision has been followed.* Indeed, the case has been cited favorably by the Courts of Missouri on at least four occasions. See, *State ex rel City of St. Louis v. Litz,* 653 S.W.2d 703 (Mo.App. 1983); *Farmer's Bank of Antonia v. Kostman,* 577 S.W.2d 915 (Mo.App. 1977); *Missouri Cities Water Company v. City of St. Peters,* 508 S.W.2d 15 (1974); *State ex rel Pruitt-Igoe Dist. Community Corp. v. Burks,* 482 S.W.2d 75 (Mo.App. 1972). In light of this overwhelming endorsement of standing rights for competitors, the *Donnelly* decision should be reexamined particularly because the Court never mentioned competitive interests and disposed of the standing inquiry under Art. V §18 of the Missouri Constitution in one short paragraph.

IV. The Missouri Certificate Of Need Law, As Applied By The Panel To St. Joseph, Is Invalid Under The Supremacy Clause, Art. VI, Clause 2 Of The U.S. Constitution.

The Missouri Certificate of Need Law was the product of the National Health Planning and Development Act of 1974, as amended 1979, 42 U.S.C. §300n. See, *Greater St. Louis Health Systems Agency v. Teasdale,* 506 F.Supp. 23 (E.D.Mo. 1980). As the panel recognized, the federal statute requires state certificate of need programs to provide persons aggrieved by the issuance of certificates the right to seek judicial review. (Slip Op. at 9.) The panel, however, ignored that federal mandate because the federal law nowhere defined "aggrieved persons entitled to

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* Attached hereto is an Appendix of Authorities listing the 24 jurisdictions following *Camp,* excluding Missouri.

seek review" as including competitors. (Id.) Yet to the contrary, the federal law was explicit in its intent to include competitors as aggrieved persons:

> The committee intends that the term "any person adversely affected by a final decision of the State Agency" will include . . . any provider in the health service area affected by an agency action . . . ." S.Rep. 96-96 at 72, reprinted in 1979 *U.S. Code Cong. and Admin. News* 1377.

Notwithstanding this clear federal requirement, the panel interpreted the Missouri Certificate of Need Law exactly opposite.

The federal statute has been determined to be a mandatory requirement on states that adopt certificate of need programs. See, *Greater St. Louis Health Systems Agency v. Teasdale,* 506 F.Supp. 23 (E.D.Mo. 1980); *Park East Corporation v. Califano,* 435 F.Supp. 46 (S.D.N.Y. 1977). Hence under the Supremacy Clause state certificate of need laws are invalid when contrary to federal law. Thus, as already has been done in Missouri, when provisions of the Missouri Certificate of Need Law are found repugnant to the federal scheme, the federal law must prevail. In *Greater St. Louis Health Systems Agency* three sections of Missouri's original certificate of need law were stricken as inconsistent with the federal law. So too here this Court should transfer this case to review the validity of the Missouri Certificate of Need Law under federal law as applied to St. Joseph.

V. The Panel Decision Should Be Reviewed By This Court Because It Renders All Committee Decisions To Issue Certificates Of Need Absolutely Immune From Judicial Scrutiny.

It is the policy of Missouri that administrative decisions be subject to judicial review. See, *In re St. Joseph Lead Co.,* 352 S.W.2d 656, 659-60 (Mo. 1961). By ruling that competitors, such as St. Joseph, lack standing to seek judicial review of Com-

mittee decisions to issue certificates of need that general policy is abrogated by the panel decision.

No person with standing exists to seek judicial review. The panel held that only the applicant and a "health systems agency" is authorized to appeal Committee decisions. (Slip Op. at 3.) Yet, as the panel acknowledged in its per curiam opinion on rehearing, health systems agencies no longer exist in Missouri. Consequently only the applicant can appeal. Obviously if the Committee grants a certificate of need, the applicant will not appeal. This leaves Committee decisions issuing certificates completely immune from judicial review. Because this result is contrary to the declared policy of Missouri this Court should grant transfer.

Dated: July 25, 1984 Respectfully submitted,

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3. *Save Sand Key, Inc. v. United States Steel Corp.,* 281 So.2d 572 (Fla.Dist.Ct. App. 1973).

4. *Bio-Medical Laboratories, Inc. v. Trainor,* 12 Ill. 600, 370 N.E.2d 223 (Ill. 1977).

5. *Iowa Bankers v. Iowa Credit Union Dept.,* 335 N.W.2d 439 (Iowa, 1983).

6. *Louisiana Independent Auto Dealers Ass'n. v. State,* 295 So.2d 796 (La. 1974).

7. *Matter of Lappie,* 377 A.2d 441 (Me. 1977).

8. *Everett Town Taxi v. Board of Aldermen,* 320 N.E.2d 896 (Mass. 1974).

9. *Twin Parts Convalescent v. Minnesota State Board of Health,* 257 N.W.2d 343 (Minn. 1977).

10. *Montana Wilderness Ass'n. v. Board of Health and Environmental Sciences,* 559 P.2d 1157 (Mont. 1976).

11. *New Hampshire Bankers Ass'n. v. Nelson,* 302 A.2d 810 (N.H. 1973).

12. *Trombetta v. Atlantic City,* 181 N.J. Super. 203, 436 A.2d 1349 (N.J. Super. Ct. Law Div. 1981).

13. *DeVargas Savings & Loan Ass'n. v. Campbell,* 87 N.W. 469, 535 P.2d 1320 (1975).

14. *New York State Bankers Ass'n. v. Albright,* 361 N.Y.S. 2d 949 (N.Y. App. Div. 1974).

15. *State ex rel. Dayton Newspapers, Inc. v. Phillips,* 351 N.E.2d 127 (Ohio 1976).

16. *Independent School Dist. No. 9 v. Glass,* 639 P.2d 1233 (Okla. 1982).

17. *1000 Friends of Oregon v. Multnomah County,* 39 Or. App. 197, 593 P.2d 1171 (Or.Ct.App. 1979).

18. *Franklin Township v. Commonwealth,* 452 A.2d 718 (Pa. 1982).

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20. *Housing Authority v. State ex rel. Velasquez,* 539 S.W.2d 911 (Tex.Civ.App. 1976).

21. *Save A Valuable Environment v. City of Bothell,* 89 Wash. 2d 862, 576 P.2d 401 (Wash. 1978) (en banc).

22. *Shobe v. Latimer,* 253 S.E.2d 54 (W.Va. 1979).

23. *Wisconsin's Environmental Decade, Inc. v. Public Service Commission of Wisconsin,* 69 Wis.2d 1, 230 N.W.2d 243 (Wis. 1975).

24. *Keslar v. Police Civil Service Commission,* 665 P.2d 937 (Wyo. 1983).

APPENDIX K

AMICI AND RELATED CASES

1. *Cedars Retirement Village Limited Partnership* appeared as an amicus on behalf of Pacific Care. Cedars' certificate of need to develop a nursing home was being challenged in *St. Joseph's Hill Infirmary, Inc. v. Rabbi Herbert J. Mandl, et al. as members of the Missouri Health Facilities Review Committee and Cedars Retirement Village Limited Partnership,* No. CV183-2979-CC-J2 (Jefferson County Circuit Court).

2. *Platte County Medical Center, Inc.* appeared as an amicus on behalf of Pacific Care. Platte County, and its counsel, were involved in nine Committee Review actions: *Platte County Medical Center, Inc. v. Missouri Health Facilities Review Committee,* No. SC-83-0163 (Admn. Hearing Com'n); *Northland Community Hospital and Medical Center, Inc. and Qualicare, Inc. v. Missouri Health Facilities Review Committee,* No. SC-83-0136 (Admn. Hearing Com'n.); *Spelman Memorial Hospital v. Missouri Health Facilities Review Committee, Platte County Medical Center-Research Health Services, and Northland Community Hospital-Qualicare,* No. SC-83-0096 (Admn. Hearing Com'n.); *New Liberty Hospital District of Clay County, Missouri v. Missouri Health Facilities Review Committee and Platte County Medical Center, Inc.,* No. SC-83-0105 (Admn. Hearing Com'n.); *New Liberty Hospital District of Clay County, Missouri v. Missouri Health Facilities Review Committee, Qualicare, Inc. and Northland Community Hospital and Medical Center, Inc.,* No. SC-83-0104 (Admn. Hearing Com'n.); *Board of Trustees of North Kansas City Memorial Hospital v. Platte County Medical Center, Inc. and Missouri Health Facilities Review Committee,* No. SC-83-0107 (Admn. Hearing Com'n.); *Board of Trustees*

of North Kansas City Hospital v. Qualicare, Inc., Northland Community Hospital and Medical Center, Inc., and Missouri Health Facilities Review Committee, No. SC-83-0106 (Admn. Hearing Com'n.).

3. *St. Joseph Hospital of Kirkwood* appeared as an amicus on behalf of St. Joseph's. St. Joseph Hospital is involved in a hospital review action captioned: *HCA Health Services of Missouri, Inc. v. Missouri Health Facilities Review Committee, Alexian Brothers Hospital; St. Anthony's Medical Center, Jefferson County Memorial Hospital and St. Joseph Hospital of Kirkwood,* No. SC-82-4711 (Admn. Hearing Com'n.).

4. *St. Anthony's Medical Center* appeared as an amicus on behalf of St. Joseph's. In addition to the above case St. Anthony's, or its counsel, is involved in the following review actions: *Community Psychiatric Centers of Missouri, Inc., d/b/a CPC Weldon Springs v. Missouri Health Facilities Review Committee and St. Anthony's Medical,* No. SC-83-3470 (Admn. Hearing Com'n.); *HCA Health Services of Midwest, Inc. v. Missouri Health Facilities Review Committee and the Sisters of St. Mary,* No. 36578 (Mo.App. W.D.); *HCA Health Services of Midwest, Inc. v. Missouri Health Facilities Review Committee and the Sisters of St. Mary,* No. CV183-123CC (Cole County Circuit Court); *HCA Health Services of Midwest, Inc. v. Administrative Hearing Commission of the State of Missouri and the Sisters of St. Mary,* No. CV183-124CC (Cole County Circuit Court); *HCA Health Services of Midwest, Inc. v. Missouri Health Facilities Review Committee and the Sisters of St. Mary,* No. SC-83-2969 (Admn. Hearing Com'n.); *HCA Health Services of Midwest, Inc. v. Administrative Hearing Commission of the State of Missouri, Missouri Health Facilities Review Committee, and the Sisters of St. Mary,* Consolidated Appeal Nos. 49251 and 49252 (Mo.App. E.D.).

5. *North Kansas City Memorial Hospital* appeared as an amicus on behalf of St. Joseph's. North Kansas City is involved in two of the review actions listed under Platte County.

6. *Marymount Health Recreation & Retirement, Inc.* appeared as an amicus on behalf of St. Joseph's. Counsel for Marymount was involved in the following review action, in addition to several listed under St. Anthony's: *Lifemark Hospitals, Inc. v. Missouri Health Facilities Review Committee and the Sisters of St. Mary,* No. SC-83-3426 (Admn. Hearing Com'n.).

7. *Charter Medical Corporation* appeared as an amicus on behalf of Pacific Care based on its involvement in the following review action: *Missouri Health Facilities Review Committee and Excepticon Midwest, Inc. v. Administrative Hearing Commission of the State of Missouri and Charter Medical Corporation,* No. 66347 (Mo.Sup.Ct.).

84-1882

No. A-821

Supreme Court, U.S.
FILED
JUN 29 1985
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ST. JOSEPH'S HILL INFIRMARY, INC.,
Appellant,

vs.

RABBI HERBERT J. MANDL, *et al.* as members of the
MISSOURI HEALTH FACILITIES REVIEW COMMITTEE,
Non-interested Party,

and

PACIFIC CARE CENTER, INC.,
Appellee.

On Appeal From The Missouri Court Of Appeals
Eastern District

MOTION TO DISMISS APPELLANT'S APPEAL

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QUESTION PRESENTED

The National Health Planning and Resources Act ("NHPRDA") provides guidelines, subject to waiver by the Secretary, for state certificate of need programs including a provision to allow "persons adversely affected by a final decision of a state agency" the right to judicial review of that decision. Congress and the Department of Health and Human Services have failed to define "persons adversely affected" and expressly left it to each state to judge the needs and goals of its program and how it will be administered.

The question presented here is whether the Missouri Certificate of Need Law ("CON Law") approved by the Secretary of the Department of Health and Human Services, is invalid under the supremacy clause of the United States Constitution because it denies an existing health care provider standing to seek judicial review of a state agency's decision granting a certificate of need for the establishment of a competing health care facility.

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No. A-821

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ST. JOSEPH'S HILL INFIRMARY, INC.,
Appellant,

vs.

RABBI HERBERT J. MANDL, *et al.* as members of the
MISSOURI HEALTH FACILITIES REVIEW COMMITTEE,
Non-interested Party,

and

PACIFIC CARE CENTER, INC.,
Appellee.

On Appeal From The Missouri Court Of Appeals
Eastern District

MOTION TO DISMISS APPELLANT'S APPEAL

Pacific Care respectfully moves this Court to dismiss Appellants Appeal of the decision of the Missouri Court of Appeals, Eastern District, entered on January 29, 1985.

OPINIONS BELOW

Appellant has correctly stated the opinions and the decisions of the state agencies and courts of Missouri in the case before this Court. Appellee shall not therefore repeat these matters.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(a) The Supremacy Clause of the United States Constitution, Article VI, Clause Two, which provides:

> This constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

(b) Jurisdiction for Review of the Missouri Court of Appeals decision in this matter is allegedly conferred by 28 U.S.C. §1257(2), which reads as follows:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * * *
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the deicison is in favor of its validity.

(c) The National Health Planning and Resource Development Act, 42 U.S.C. §300n-1(a) and (b)(12)(E), which provide:

> (a) In conducting review pursuant to subsections (e), (f), and (g) of section 1513 [42 U.S.C.U. §3001-2(e), (f), and (g)] or in conducting any other reviews of proposed or existing health services, each health systems agency shall (except to the extent approved by the Secretary) follow procedures, and apply criteria, developed and published by the agency in accordance with regulations of the Secretary; in performing its review functions under section 1523 [42

U.S.C.S. §300m-2], a State Agency shall (except to the extent approved by the Secretary) follow procedures, and apply criteria, developed and published by the State Agency in accordance with regulations of the Secretary; and in performing its review functions a Statewide Health Coordinating Council shall (except to the extent approved by the Secretary) follow procedures and apply criteria developed and published by the Council in accordance with regulations of the Secretary...

(b) Each health systems agency, State Agency, and Statewide Health Coordinating Council shall include in the procedures required by subsection (a) of this section at least the following:

* * * * *

(12) The following procedural requirements with respect to proceedings under a certificate of need program:

* * * * *

(E) Any person adversely affected by a final decision of a State Agency with respect to a certificate of need or an application for an exemption under section 300n-6(b) of this title and a health systems agency if the decision respecting the certificate of need is inconsistent with any recommendation made by the agency to the State Agency with respect to the certificate of need may, within a reasonable period of time after such decision is made (and any administrative review of it completed), obtain judicial review of it in appropriate State court. The decision of the State Agency shall be affirmed upon such judicial review unless it is found to be arbitrary or capricious or not made in compliance with applicable law.

(d) Section 197.335 of the Missouri Certificate of Need Law, Mo. Rev. Stat. §197.300, et seq. (1984 Cum Supp.), which provides as follows:

> Appeals, venue. — Within thirty days of the decision of the committee, the applicant or the health systems agency within whose area the new institutional health service is to be offered may file an appeal in accordance with the provisions of sections 161.252 to 161.342 and chapter 536, RSMo. provided, that venue of any appeal to the circuit court shall be in the county within which such health care service or facility is proposed to be developed.

STATEMENT OF THE CASE

With the exception stated below, Appellant's Statement of the Case adequately advises the Court of the parties and the proceedings had in this matter in the State Agencies and Courts below. Appellee shall not restate same but rather directs the Court's attention to Appellant St. Joseph's admission that it failed to raise the constitutional question presented to this Court until its Application for transfer presented to the Missouri Supreme Court. (Statement of Jurisdiction at 9-11).

Appellant did not previously raise this constitutional question in the Circuit Court or in the Missouri Court of Appeals, Eastern District. Its argument in those Courts was not that the Missouri CON Law as it related to judicial review conflicted with NHPRDA and was therefore invalid on the basis of the Supremacy Clause of the United States Constitution, but rather it argued the intent of the Missouri Legislature to afford Appellant the right of judicial review is evidenced by its alleged desire to adopt the guidelines set forth in NHPRDA. Appellant did not raise the issue in it's Motion for Rehearing filed in the Missouri Court of Appeals. (App. at A-1).

ARGUMENTS SUPPORTING APPELLEE'S MOTION TO DISMISS

I. This Court Should Not Accept Jurisdiction Over This Case As An Appeal Under 28 U.S.C. §1257(2) For The Reason That The Constitutionality Of A State Statute Was Not Drawn Into Question, Presented Or Decided In The Case By The Missouri Court Of Appeals.

Appellant has alleged that jurisdiction to review the decision of the Missouri Court of Appeals is conferred upon the Supreme Court by 28 U.S.C. §1257(2), which provides:

> Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> > (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of its validity.

The federal question presented must be timely and properly raised and expressly decided. Supreme Court Rule 16(1)(b); *Live Oak Water User's Association v. Railroad Commissions,* 269 U.S. 354 (1926). When it has not been presented to and decided by the court whose decision is being appealed the United States Supreme Court should not take jurisdiction. *New York v. Kleinert,* 268 U.S. 646 (1925). Likewise, when the question is first presented by application for transfer to a higher state court, the Supreme Court should not take jurisdiction unless the question was thereupon considered and passed upon adversely by that state court. In the case at bar, the Missouri Supreme Court retransferred the case without decision. (Appellant's App. at A-47).

Appellant did not draw into question whether the Missouri CON Law was constitutional in either the Missouri Circuit

Court or Court of Appeals. (Appellant's Statement of Jurisdiction at 9-11). Further, it was not raised in Appellant's Motion for Rehearing or Transfer filed in the Missouri Court of Appeals (App. at A-1). In fact, the constitutionality of the Missouri CON Law was not drawn into question by Appellant until its application for transfer to the Missouri Supreme Court. (Appellant's App. at A-72). The question presented to the Circuit Court and the Court of Appeals was whether the Missouri legislature intended to afford Appellant the right of judicial review as evidenced by what Appellant alleged as its desire to adopt the guidelines set forth in NHPRDA.

Accordingly, the question not having been timely or properly presented to or decided by the state courts, jurisdiction is not conferred to this Court by section 1257(2) and the Court should not take jurisdiction over the matter.

II. Appellant's Appeal From The Decision Of The Missouri Court Of Appeals, Eastern District, Does Not Present A Substantial Federal Question Meriting Review By This Court.

Appellant states that the central question in this case is the obligation of states to follow the NHPRDA, but fails to properly address each provision of the act, the current regulations implementing it, and the cases construing it. On proper review it is apparent that Congress intended by the NHPRDA of 1974, as amended in 1979, to benefit consumers of health care services by reducing the costs of these services. Any benefit conferred upon existing health care providers was merely incidental, if not speculative. *Community Psychiatric Centers v. Grant,* 664 F.2d 1148 (9th Cir. 1981). In 1979 Congress enacted amendments to the act to improve competition as one manner employed to effect this result. *National Gerimedical Hospital v. Blue Cross,* 452 U.S. 378, 387 (1981). It is also apparent that many provisions of NHPRDA, including the provisions thereof concerning judicial review, are not self-executing and were not intended to extend rights to existing health care providers.

Appellant argues that NHPRDA mandates that each state health plan have certain specified procedural requirements regarding its certificate of need program. Relying upon 42 U.S.C. §300n-1(b)(12)(E), Appellant argues it has a right to seek judicial review of a decision of the state agency, that right being among those alleged requirements. Appellant fails, however, to consider the entire act and the judicial decisions construing it. In addition, the holdings of the cases it cites do not support its contention.

By case law it is well established that the federal act is not binding upon the states and does not determine state certificate of need issues. *See Greater St. Louis Health Systems Agency v. Teasdale,* 506 F.Supp. 23 (E.D., Mo. 1980); *North Carolina ex rel. Morrow v. Califano,* 445 F.Supp. 532 (E.D., N.C. 1977), *aff'd mem.,* 435 U.S. 1962 (1978); *Goodin v. State ex rel. Oklahoma Welfare Commission,* 436 F.Supp. 583 (W.D. Ok. 1977); and *East Tennessee Health Improvement Council, Inc. v. Tennessee Health Facilities Commission,* 626 S.W.2d 272 (Tenn. App. 1981). As these courts found, NHPRDA provides only a model, guidelines, with no direct bearing upon the terms of the state certificate of need laws. The NHPRDA is not self-executing. *East Tennessee Health Improvement Council, supra* at 276. Although failure to comply with its terms may result in the denial of federal funds for specific state programs, a state is nevertheless free to risk this financial loss by ignoring provisions of the federal act and its regulations if it chooses to do so.

Further, the act itself specifically provides that the state plan, and its certificate of need program, need only be satisfactory to the Secretary of the Department of Health and Human Services to receive approval and federal funding. 42 U.S.C. §300n-1(a) (1983); *Greater St. Louis Health Systems Agency, supra* at 28. Appellant has not disputed that Missouri's state health plan and present certificate of need law has been approved by the Secretary. As the Missouri Court of Appeals found in its decision in this case section 300n-1(a) expressly provides that pro-

cedural requirements that may otherwise be required in a state health plan or certificate of need program may be waived by the secretary. (Appellant's App. at A-44). Section 197.335 of the Missouri CON Law provides that *only* the applicant and the respective health systems agency have standing. By approving the Missouri certificate of need program the secretary implicitly waived any procedural requirement that may have required that existing health care providers be granted the right to seek judicial review.

Furthermore, as the Missouri Court of Appeals found, even assuming that the procedures and procedural requirements provided in section 300n-1(b) are mandatory, the particular procedural requirements must nevertheless be construed. Section 300n-1(b)(12)(E) provides as follows:

> Any person adversely affected by a final decision of a state agency with respect to a certificate of need...and a health systems agency...may with a reasonable period of time after such decision is made (and any administrative review of it completed), obtain judicial review of it in an appropriate state court. The decision of the state agency shall be affirmed upon such judicial review unless it is found to be arbitrary or capricious or not made in compliance with applicable law.

Although Congress provided the definitions for many terms used in this act, it did not define the terms "affected persons" or "persons adversely affected." *See* 42 U.S.C. §300n and 300n-1(b)(12(E).

Current regulations of the Department of Health and Human Services also do not define "affected persons." 42 C.F.R. §123.401 & .410(a)(14), as amended, *see* 50 Fed.Reg. 2008, 2009, 2013, and 2018 (1985) (effective February 15, 1985). Pursuant to amendments to the Public Health Service Act the Department of Health and Human Services amended its regulations with the "primary purpose...to reduce regulatory

burdens and to give states maximum flexability in operating their certificate of need programs." 50 Fed.Reg. 2008 (1985). The federal agency found that "*each state is the best judge of the needs and goals of its program and, therefore, should decide, to the maximum extent possible, how its certificate of need program should be administered.*" *Id.* (Emphasis added). Accordingly, it deleted all definitions of "affected persons" and "person adversely affected", concluding the definitions were not consistent with congressional intent and not required by statute. 50 Fed. Reg. 2008, 2009, 2013 and 2018 (1984). Thus, the principal basis upon which Appellant has previously argued that it had the right to seek judicial review has been eliminated by a regulatory agency carrying out the intent of Congress.

The decision of the Missouri Court of Appeals is consistent with prior decisions of courts deciding the right to "standing" based upon NHPRDA. In *Community Psychiatric Centers v. Grant,* 664 F.2d 1148, 1151 (9th Cir. 1981), the United States Court of Appeals decided that NHPRDA does not grant an existing health care operator an express or implied private right of action to prevent a hospital from offering new institutional health services. The Court found that "[c]ongress was not concerned with the harm that a competitor might suffer by the entry of a new provider into the market where there was no actual need for its services. Rather, Congress was concerned with the rising cost of hospital care and the trend toward the practice of supplying unnecessary service." *Id.* at 1151. The Act was intended to benefit consumers of hospital services and their insurers, and not existing health care facilities. *Id.* at 1152. *See also East Tennessee Health Improvement Council, Inc. v. Tennessee Health Facilities Commission,* 626 S.W.2d 272 (Tenn. App. 1981) (Health Systems Agency held not an "aggrieved person" and denied standing).

Appellant argues that the decision of the Missouri Court of Appeals "establishes a precedent of nationwide impact for the operation of the NHPRDA's certificate of need program and

will produce conflicting interpretations of the program." It suggests that the decision of the Missouri Court of Appeals may affect the decision regarding matters presently pending before *trial courts* in the State of Connecticut. As stated above, it is the intent of Congress and the Department of Health and Human Services that states be given maximum flexability in operating their certificate of need programs. Thus, Appellant's request that this Court afford standing rights to each and every current health care provider without regard to the standing rights of each respective state should be denied.

Appellant has also cited other state court cases holding health care providers have standing to seek judicial review of the decision of a state agency. Like the Missouri Court of Appeals, those courts determined the "standing" rights of the parties based upon state law, not NHPRDA. *See Sisters of Providence in Washington, Inc. v. Department of Social Services,* 648 P.2d 970 (Alaska 1982); *Memorial Hospital of Southern California v. State Planning Council,* 28 Cal. App. 3rd 167, 104 Cal. Rptr. 492 (1972); *Suburban Medical v. Olathe Community Hospital,* 597 P.2d 645 (Kan. 1979); *Twin Ports Convalescent, Inc. v. Minnesota State Board of Health,* 257 N.W.2d 343 (Minn. 1977); In Re Wilksboro, Ltd., 285 S.E.2d 626 (N.C. App. 1982); *Tulsa Area Hospital Council, Inc. v. Oral Roberts University,* 626 P.2d 316 (Ok. 1981) ("standing issue not examined).

Assuming the question of constitutionality was properly presented to the Court, the decison of the Missouri Court of Appeals in this case does not conflict with recent decisions of this Court regarding the Supremacy Clause of the United States Constitution. In *Michigan Canners and Freezers Association, Inc. v. Agricultural Marketing and Bargaining Board,* ____ U.S. ____, 104 S.Ct. 81 L.Ed.2d 399, 52 U.S.L.W. 4739 (1984), this Court held the Michigan statute was preempted by the Federal Agricultural Fair Practices Act since it authorized producers associations to engage in conduct which the federal act expressly prohibited. In *Lawrence County v. Lead-Deadwood*

School District No. 40-1, ____ U.S. ____, 105 S.Ct. 695, 703-704 (1985), this Court held that the South Dakota statute limiting the use by its political subdivision of payments received from the federal government pursuant to the payment in lieu of taxes act was preempted because Congress had directly provided in the act that the funds so paid could be used for "any" use.

The Missouri Certificate of Need Law is not so preempted. Congress enacted NHPRDA under its spending power. *Greater St. Louis Health Systems Agency, supra; Consumer Psychiatric Centers, supra.* It is not self-executing and the Secretary is given the discretion to waive procedural requirements to allow states maximum flexibility in operating their certificate of need programs. *Id.*

CONCLUSION

Appellant failed to timely raise a constitutional argument, its petition for appeal of the decision of the Missouri Court of Appeals, Eastern District fails to present a substantial federal question and the Missouri decision is not in conflict with other decisions construing the National Health Planning and Resources Development Act. Accordingly, this Court should dismiss Appellant's appeal.

Respectfully submitted,

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APPENDIX

IN THE
MISSOURI COURT OF APPEALS
EASTERN DISTRICT

No. 47685

St. Joseph Hill Infirmary, Inc.,
Plaintiff-Respondent,

v.

Rabbi Herbert J. Mandl, et al.,
as members of the Missouri
Health Facilities Review
Committee,
Non-appealing Defendant,

and

Pacific Care Center, Inc.,
Defendant-Appellant.

MOTION OF ST. JOSEPH HILL INFIRMARY, INC. FOR REHEARING, OR IN THE ALTERNATIVE, FOR TRANSFER TO THE SUPREME COURT AND INCORPORATED SUGGESTIONS IN SUPPORT

Now comes Plaintiff-Respondent St. Joseph Hill Infirmary, Inc. ("St. Joseph"), and hereby moves this Honorable Court, pursuant to Rules 84.17 and 83.02, for Rehearing or, alternatively, for Transfer. In support of its Motion, St. Joseph respectfully states as follows:

1. On May 22, 1984, the panel issued its Opinion holding that St. Joseph's interest was insufficient to confer standing, under Missouri Constitution Article V, Section 18, to seek judicial review of a Missouri Health Facilities Review Committee ("Committee") decision granting Pacific Care Center, Inc. ("Pacific Care"), a competitor of St. Joseph, a certificate of need ("CON") to build a nursing home. In so ruling, the panel placed heavy reliance on its belief in the existence of Health Systems Agencies ("HSAs") to appeal from Committee deci-

sions in order to protect the public interest in lower health care costs.

This confidence in the role of HSAs in the appellate process was expressed at least three times in this initial opinion. First, in rejecting St. Joseph's argument that denial of competitor standing in CON cases foreclosed judicial review, the panel states that: "The statutory framework of the CON Statute provides for an appeal by the applicant, which has a private interest, *or by the area HSA which exists to protect the public interest.*" (Slip Op. at 4.) Again, in a later discussion of the reasons why the panel maintained that the legislature intended to deny competitor challenges to CONs, the Opinion recites: "only if the action of the Committee is such as to trigger *the appellate opposition of the HSA, representing the public interest* is determination of necessity to be delayed for an appellate review." (Slip Op. at 8.) Finally, in an analysis of the standing issue in the context of the banking cases, an examination mandated "because of parallels to the statutes now before us" (Slip Op. at 5), the panel rejected St. Joseph's view of those cases because: "There is also a difference in the availability of an agency to represent the public interest, particularly *in view of the existence of HSA's* whose function is exactly that." (Slip Op. at 9).

However, *HSAs no longer exist in Missouri and have not existed for three years.*[1] Accordingly, the panel's analysis of the

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[1] The termination of HSAs was described at oral argument. Counsel listened to the Court's tape of the oral argument wherein counsel for St. Joseph stated: "Well, as was pointed out in the Amicus Brief of Platte County Medical Center, Health Systems Agencies don't exist any more in the State of Missouri. They were banned by executive order of Governor Bond in 1980." That point was undisputed by Pacific Care and accordingly, this Court should take judicial notice of that fact. See *Flight Engineers' Internat'l Ass'n v. Trans World Airlines,* 305 F.2d 675, 679 n. 6 (8th Cir. 1962). Further, copies of Governor Bond's Executive Order, and the Secretary of Health and Human Servcies' response, are attached to this Motin. As these orders are public records of official acts this Court may take judicial notice of the attached. See, *Kansas City v. City of Raytown,* 421 S.W.2d 504, 513 (Mo. 1967) (En Banc).

legislative history, its examination of the concededly relevant precedent, and, indeed, its assessment of the impact of its ruling on the "public interest" is fundamentally flawed because it depends on the assumed existence of an agency that was terminated three years ago by the Governor.

Thus, contrary to the misplaced belief expressed by the panel, no one exists to seek judicial review of Committee decisions to approve new health facilities. Stated otherwise, this panel's Opinion forecloses review in any case where the applicant is successful before the Committee. Surely neither the Committee, which issued the approval here, nor Pacific Care, which obtained approval here, will appeal a favorable ruling. In the absence of the HSAs, the only person who is aggrieved by the decision, to an extent sufficient to challenge the Committee's action, is a competitor, such as St. Joseph.

The mistaken reliance on HSAs to vindicate the public interest demonstrates the vital importance in recognizing standing rights in competitors to challenge CON decisions. In the absence of those standing rights an agency decision, such as the one at issue here, is left totally insulated from any judicial scrutiny even though the undisturbed findings of the circuit court below were that: (1) Pacific Care's proposed facility and St. Joseph's facilities would compete for the same patients (L.F. at 24); (2) The State Health Planning and Development Agency, the investigative arm of the Committee, found the proposed facility to be unnecessary and potentially harmful to other providers, including St. Joseph (L.F. at 26); and (3) the Committee's decision contained no findings of fact and conclusion of law and was thus contrary to its own rules (L.F. at 41-44). Consequently this matter should be reheard, or transferred, by this Court because of the material mistake of fact as to the existence of HSAs.

2. This Court should grant rehearing, or transfer, because the panel's opinion is directly contrary to established precedent in

both the Western District and this District. In rejecting the theory that a bank's competitive interest, like that of an institutional health care provider, is sufficient to confer standing under the Missouri Constitution Article V, Section 18, the panel's opinion is in conflict, and contrary to, the following decisions:

(A) *Bank of Belton v. State Banking Board,* 554 S.W.2d 451 (Mo.App. 1977)(W.Dist.). The Court in *Bank of Belton* held that, under a system of regulated competition, the Missouri Constitution accords competitor standing:

> There can be little question that a bank is aggrieved by a decision to allow a competitor facility within the same trade area . . . . The economic interest Belton Bank seeks to protect against the administrative order which allows UMB a facility in competition falls within the zone of interests protected by Article 5, §22 [now §18] of the Missouri Constitution as defined in §536.100. (554. S.W.2d at 453.)

The panel expressly rejected that holding of the Western District. (Slip Op. at 7-8.); and

(B) *Bank of Crestwood v. State Banking Board,* 554 S.W.2d 519 (Mo.App. 1977)(E.Dist. per Weier, J. with Kelly, J. and Gunn, J. concurring). In *Bank of Crestwood,* this District held that a competitor bank had standing to challenge an administrative decision to certify a competing bank facility. The decision in *Bank of Crestwood* was handed down four weeks after *Bank of Belton* was decided. The Eastern District panel expressly followed the holding in *Bank of Belton* because the Western District opinion "is well reasoned, based on sound principles and precedent, and rules this appeal." (554 S.W.2d at 522). The panel's rejection of *Bank of Belton* is directly contrary to the decision of another panel of this District; and

(C) *Farmer's Bank of Antonia v. Kostman,* 577 S.W.2d 915 (Mo.App. 1979). In *Farmer's Bank* the Court found com-

petitive interests sufficient to confer standing on one bank to challenge the Director of Finance's decision, pursuant to Mo.Rev.Stat. §362.108 (1978), to allow another bank to establish a branch. Importantly, however, the legislative provision at issue in *Farmer's Bank* did not allow competitor banks to intervene in the Director of Finance's decision to allow branching under Section 362.108, nor was there any provision for judicial review of a decision under Section 362.108 even though other administrative decisions pertaining to bank branching were made expressly subject to review. Nevertheless, the Court in *Farmer's Bank* held that a competitor bank's economic interests gave rise to standing rights under Article V, Section 18 of Missouri's Constitution. The omission of the statutory provisions for intervention are significant under the panel's opinion because the statutory right to intervene is perceived by the panel to be the fact distinguishing standing rights under the banking laws and the CON Law. Yet *Farmer's Bank* recognizes constitutional standing rights in the face of a statutory provision containing no intervention or appeal rights for competitors. The panel's opinion is, therefore, directly contrary to the holding in *Farmer's Bank;*

* * * *

This cause should be reheard, or transferred, because the panel's opinion is contrary to the decisions of both the Eastern and Western District Courts of Appeal.

3. This Court should grant rehearing, or transfer, because the panel's Opinion is in conflict with the decision in *Farmer's Bank of Antonia v. Kostman,* 577 S.W.2d 915, 921 (Mo.App. 1977), in still another crucial respect. The panel recognized that the purpose of the CON Law is to restrict competition. Then the panel concluded that such a purpose failed to give competitors an interest sufficient to create "private rights," because:

> "[t]he purpose of restricting competition through licensing is to benefit the public generally, not to protect the rights

> or interests of the regulated companies. As such, competitors may be the beneficiaries of the licensing procedures but those procedures do not directly affect their 'private rights'." (Slip Op. at 7.)

That holding is directly contrary to *Farmer's Bank of Antonia v. Kostman,* 577 S.W.2d 915, 921 (Mo.App. 1977), where the Court held that although the banking laws restricted competition to protect the public interest, that statutory policy also gave rise to private rights in existing competitor banks to resist competition. Thus the panel stated that:

> As a prelude, we iterate that the *law accords status to a competitor bank for judicial review* of an administrative grant of charter or facility to another bank within the trade area, not to protect monopoly, but *to keep the system of banks within an equipoise of competition and regulation and so secure the public against the economic havoc of bank failure.* (577 S.W.2d at 921, emphasis added.)

The panel's opinion fails to mention or discuss this conflict with the decision in *Farmer's Bank,* and accordingly this cause should be reheard, or transferred, to resolve this conflict.

4. The Court should grant rehearing, or transfer, because the panel's decision is predicated upon an erroneous reading of *State ex rel Donnelly v. Rouveyrol,* 285 S.W.2d 669 (Mo. Banc 1956). The panel read *Donnelly* as holding that competitor banks lacked standing to challenge decisions granting new bank incorporations in the absence of a statutory right to seek such review. (Slip Op. at 5.) *The Court in Donnelly never considered the status of a competitor.* The Court only held that a person denominated only as a "protestant" lacks standing. Thus, as the *Donnelly* Court plainly stated:

> This application . . . recites "Comes also University Bank, the Protestant herein, a corporation interested in the order of Board of Appeals." It does not appear that the courts

> of Missouri have had occasion to judicially define the term "Protestant" as used herein; however, in Webster's New International Dictionary, 2nd Ed., this definition appears: "3. One who makes or enters a protest; as the *protestants* against proposed legislation." This definition is consistent with the capacity in which the University Bank appeared before the board of bank appeals. (285 S.W.2d at 676).

Hence, the panel's reading of *Donnelly* is incorrect for it equates "protestant" in the context of a banking case with "competitor" in the context of this case. The *Donnelly* opinion never even mentions, much less analyzes, competitive interests. Consequently *Donnelly* failed to address the proposition for which it is cited by the panel.

5. This Court should grant rehearing, or transfer, because the panel's opinion is contrary to the decision in *City of Eureka v. Litz,* 658 S.W.2d 519 (Mo.App. 1983). The panel held that because the system of regulated competition under the CON Law is for the benefit of the public at large, competitors are accorded no private rights. (Slip. Op. at 7.) In so holding the panel assumes that the presence of an overriding public interest automatically precludes private rights.

However, all legislative and administrative action must, ultimately, be for the public good. See, *Day-Brite Lighting v. Missouri,* 342 U.S. 421, 423-25 (1952). With the Missouri Constitution's prohibition of special legislation, administrative action taken pursuant to statutes that regulate competition can only be sustainable if taken to promote the public interest as opposed to a private interest. See, *Annbar Associates v. West Side Redevelopment Corp.,* 397 S.W.2d 635, 646-47 (Mo. 1965) (En Banc). Notwithstanding the overriding public purpose to all regulatory schemes the panel recognized that "a competitor may achieve the status of an 'aggrieved person' based on the legislative policy of the particular statute establishing the administrative review." (Slip Op. at 5 citing *City of Eureka v.*

Litz, 658 S.W.2d 519 (Mo.App. 1983). Yet under the panel's reasoning it is impossible for that to occur because every statutory scheme must be created to serve some public interests. Thus no private rights can ever exist under the panel's formulation of the standing inquiry. Moreover standing to vindicate and promote a public purpose has been specifically recognized in taxpayer suits—an impossible result under the panel's view that the public purpose precludes private rights. See, *Missourians for Separation of Church and State v. Robertson,* 592 S.W.2d 825, 837-39 (Mo.App. 1979). Hence this matter should be reheard, or transferred, because of the general importance of this proposition and its conflict with the *City of Eureka* decision.

6. The panel's decision conflicts with the established rule in Missouri that the existence of standing rights under the Missouri Constitution is a judicial inquiry. The panel examined St. Joseph's interest to challenge the Committee's decision as whether the legislature intended competitors to have appeal rights. Thus, the panel explained that "[w]hether the system of regulation is best served by allowing competitors to participate in the administrative procedure is a legislative determination." (Memo. Op. at 8.) This statement is directly contrary to the holdings of *City of Eureka v. Litz,* 658 S.W.2d 519 (Mo.App. 1983); *State ex rel Schnieder v. Stewart,* 575 S.W.2d 904 (Mo.App. 1977), which state that whether a party is entitled to standing is a judicial question independent of the legislature's intention to give or deny appeal rights. Rehearing or transfer should be granted to resolve this conflict.

7. The panel erroneously relied on the legislative history of the Missouri CON Law and the National Health Planning and Resource Development Act, 42 U.S.C. §300, *et seq.* to decide the standing rights of St. Joseph. Assuming, *arguendo,* that the legislative history is relevant, the panel was wrong, or ignored, three key aspects to the relevant legislative histories and should rehear, or transfer, this cause to correct these errors of material fact and law:

(A) The panel heavily relies on changes to the original Missouri CON Law to conclude "affected persons", including competitors, lacked standing. Yet the panel ignores that the changes related to different appeal forums and not to the right to appeal. The original H.B. 222 provided in Section 9.1 that the applicant and HSA could appeal to the *Adminsitrative Hearing Commission.* There was no provision relating to the persons entitled to seek judicial review in circuit court. Such an omission is understandable because the decided Missouri case law was that the right to seek judicial review was secured by the Missouri Administrative Procedure and Review Act, Mo.Rev.Stat. §536, *et seq.,* in the absence of an inconsistent remedy provided specifically by the legislature. See *State ex rel Schnieder v. Stewart,* 575 S.W.2d 904 (Mo.App. 1977). Then in H.B. 222, as perfected, the Administrative Hearing Commission appeal right was deleted in favor of a general appeal to circuit court for all persons. As passed, however, the legislation reinstated the Administrative Hearing Commission appeal in lieu of direct appeal to circuit court. Again, though, the statute was silent as to the parties entitled to seek judicial review as opposed to further administrative review. Thus, in reality, the only thing that changed was the existence or non-existence of an administrative appeal as opposed to who had the right to seek judicial review. At best the legislative history is ambiguous as to standing rights for judicial review.

(B) The panel also ignored that the Missouri legislature amended the CON Law after standing rights under the law had been recognized for competitors. On May 20, 1983, the Circuit Court for St. Louis County held that competitors had standing under the Missouri CON Law to challenge a Committee decision to allow a new facility or service. See, *The Washington University v. Missouri Health Facilities Review Committee,* Findings of Fact, Conclusions of Law and Judgment (No. 481596, May 20, 1983). (A copy of the decision is found in St. Joseph's Appendix to its Brief.) Following that decision the legislature passed, and the Governor signed into law on July 1, 1983,

amendments to the Missouri CON Law. No alteration of the law was made to change the result in *The Washington University* case. The established law of this state is that the legislature is presumed to know judicial constructions of its acts. See, *State ex rel Danforth v. Milan C-11 School District,* 446 S.W.2d 768 (Mo. 1969). Moreover the legislature's failure to amend the law to change the result of a judicial construction gives rise to a presumption that the legislature agreed with and intended the result. See, *Phillips Pipeline Co. v. Brandstetter,* 263 S.W.2d 880, 885 (Mo.App. 1954). Thus, the legislature's 1983 amendments to the Missouri CON Law show an intent to grant competitors standing by leaving unaffected the *The Washington University* decision; and

(C) The panel ignored the federal legislative model because the statute nowhere defined "aggrieved persons entitled to seek review" as including competitors. (Slip Op. at 9.) Yet quite to the contrary, the legislative history of the federal act was explicit that "aggrieved persons" were to include competitors:

> The committee intends that the term "any person adversely affected by a final decision of the State Agency" will include . . . any provider in the health service area affected by an agency action . . . ." S.Rep. 96-96 at 72, reprinted in 1979 *U.S. Code Cong. and Admin. News* 1377.

The legislative history of the federal statutory model is deemed to be part of the relevant legislative history for Missouri's CON Law. See, *State v. Mitchell,* 563 S.W.2d 18, 24 (Mo. 1978).

Hence, when properly viewed the legislative history establishes that the federal law, which Missouri's CON law is patterned after, requires persons like St. Joseph to have standing, that the Missouri legislature amended the CON law, after it had been judicially construed to grant standing rights, and made no changes in the appeal provisions of the law, and the initial intent of the legislature with respect to appeal rights is, at best, ambiguous.

WHEREFORE, for all of the above reasons, Plaintiff-Respondent St. Joseph Hill infirmary, Inc. respectfully requests that this Honorable Court grant this Motion for Rehearing or, alternatively, Transfer this cause to the Supreme Court.

Dated: June 6, 1984 Respectfully submitted,

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